Supreme Court, U.S.
FILED

942103 JUN - 6 1995

OFFICE OF THE CLERK
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In Re

CHAR YIGH MARINE (PANAMA) S.A.

Petitioner

PETITION FOR WRIT OF MANDAMUS / CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

DAVID E. R. WOOLLEY
Counsel of Record

WILLIAMS WOOLLEY COGSWELL NAKAZAWA & RUSSELL

111 West Ocean Boulevard, Suite 2000
Long Beach, California 90802
(310) 495-6000

Attorneys for Petitioner
CHAR YIGH MARINE (PANAMA) S.A.

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

95 0

QUESTION PRESENTED

May the Ninth Circuit Court of Appeals ignore Federal Rule of Civil Procedure 25(c), its own published precedent on that Rule, and its own published 1990 decision in the present case, and sustain a 1992 District Court judgment of $1 million against Char Yigh Marine (Panama) S.A. on the grounds that Char Yigh lacks capacity to protect itself by reason of a corporate dissolution during the litigation?

PARTIES TO THE PROCEEDING

RULE 29.1 LIST OF PARENT AND SUBSIDIARY COMPANIES

The parent company of Petitioner Char Yigh Marine (Panama) S.A. is SB General Leasing (Hong Kong) Co., Ltd. There are no affiliate or subsidiaries of the Petitioner.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

LIST OF APPENDICES iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

SYNOPSIS 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 13

The Court of Appeals has Refused to Apply the Mandatory Provisions of F.R.Civ.P. 25(c) or Its Own Published Precedent to the Actions of the District Judge Below and, in the Process, has Declared After 11 Years of Litigation that Petitioner Char Yigh Must Forfeit Its $1 Million Bond to Plaintiff Interpool Even Though the District Court has Dismissed Interpool's Case for Damages Against Char Yigh With Prejudice 13

1. The Law is Not Being Obeyed 14

2. The Memorandum Produces Grotesquely Aberrational Results 20

CONCLUSION 23

LIST OF APPENDICES

Page

APPENDIX A
Not for Publication Memorandum, Ninth Circuit Court of Appeals, Filed March 8, 1995. . . . . A1

APPENDIX B
Opinion, Filed December 4, 1989 . . . . . B1
and Order Modifying Opinion, Filed November 28, 1990 . . . . . B18

APPENDIX C
Judgment, U.S. District Court Southern District of New York, Filed August 13, 1984. . . . . C1

APPENDIX D
Char Yigh's Answers to Jurisdictional Interrogatories, U.S. District Court Central District of California, Dated April 24, 1986. . . . . D1

APPENDIX E
Involuntary Third-Party Claim of Char Yigh, Dated January 10, 1992 . . . . E1

APPENDIX F
Summary Judgment for Plaintiff, Filed January 17, 1992 . . . . . F1

APPENDIX G
Order re Motion for Reconsideration, Filed April 15, 1994. . . . . G1

APPENDIX H
Ninth Circuit Local Rule 36-3. . . . . H1

TABLE OF AUTHORITIES

Page

Cases

Eichman v. Fotomat Corp.
(9th Cir. 1985) 759 F.2d 1434 20

Elder v. Holloway (1994)
__ U.S. __, 127 L.Ed.2d 344,
114 S.Ct. 1019. 11

Federated Department Stores v. Moitie (1981)
452 U.S. 394, 101 S.Ct. 2424,
63 L.Ed.2d 103 21

Foss Launch & Tug Co. v. C.C. SAN FRANCISCO
(9th Cir. 1987) 808 F.2d 697. 5

Foman v. Davis (1962)
371 U.S. 178, 9 L.Ed.2d 222,
83 S. Ct. 227. 22

Hilbrands v. Far East Trading Company, Inc. 1, 3, 10
(9th Cir. 1975) 509 F.2d 1321 . . . . 13, 17, 18, 21

Interpool Ltd. v. Char Yigh Marine (Panama) S.A.
(9th Cir. 1989) 890 F.2d 1453,
modified (9th Cir. 1990)
918 F.2d 1476 . . . . . 1, 7, 12, 13, 17, 19, 21

Kim v. Fujikawa
(9th Cir. 1987) 871 F.2d 1427 20

Mirin v. State of Nevada
(9th Cir. 1976) 547 F.2d 91 20

Page

Montana v. Johnson
(9th Cir. 1984) 738 F.2d 1074 13

Parkland Hosiery Co. v. Shore (1979)
439 U.S. 332, 58 L.Ed.2d 552,
99 S.Ct. 645 20

Surowitz v. Hilton Hotels Corp. (1966)
383 U.S. 363, 86 S.Ct. 845,
15 L.Ed.2d 807 14

U.S. v. State of Washington
(9th Cir. 1989) 872 F.2d 874. 13

United States for the use of Acme Granite &
Tile Co. v. F.D. Rich Company, Inc.
(9th Cir. 1970) 437 F.2d 549, *aff'd on reconsideration* (9th Cir. 1971)
444 F.2d 1143 . . . . . .1, 10, 13, 18-21

Statutes

28 U.S.C. § 1254(c) 3
28 U.S.C. § 1333(1) 2
28 U.S.C. § 1651(a) 3

Federal Rules

Federal Rules of Civil Procedure
Rule 1 14
Rule 8(f). 20
Rule 9(h) 2
Rule 17 . . . . . 9, 10
Rule 17(a) 3, 4, 10, 11, 17-19
Rule 25(a) 4, 10
Rule 25(c) 1, 3, 4, 10, 11, 13-15, 23

Page

Court Rules

Ninth Circuit Local Rule 36-3 . . . . . 4, 12

Supreme Court Rules
Rule 10.1 (a). 3
Rule 13.1 3
Rule 13.4 3
Rule 20 3

Treatise

7C Wright, Miller, Kane, Federal Practice and Procedure, Civil 2d Ed. 1986, § 1958 Transfer of Interest. 16

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

In Re

CHAR YIGH MARINE (PANAMA) S.A.

Petitioner

PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

Petitioner Char Yigh Marine (Panama) S.A. respectfully prays that a writ of mandamus issue to the United States Court of Appeals for the Ninth Circuit to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing the Ninth Circuit Court of Appeals to vacate its Not for Publication Memorandum Decision of March 8, 1995 and to reconsider the issues in this matter in light of F.R.Civ.P. 25(c) and the published opinions in *Hilbrands v. Far East Trading Company, Inc.* (9th Cir. 1975) 509 F.2d 1321 and *United States for the use of Acme Granite & Tile Co. v. F.D. Rich Company, Inc.* (9th Cir. 1970) 437 F.2d 549, *aff'd on reconsideration* (9th Cir. 1971) 444 F.2d 1143, and *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.* (9th Cir. 1989) 890 F.2d 1453 at n.6, *modified* (9th Cir. 1990) 918 F.2d 1476.

Alternatively, if this honorable Court should deem this a suitable matter for a writ of certiorari, it is requested to issue an appropriate writ of certiorari to the same court to review the Not for Publication Memorandum Decision of March 8, 1995, identifying Interpool Limited, plaintiff, as respondent.

OPINIONS BELOW

1. The Not for Publication Memorandum of March 8, 1995 of the Ninth Circuit Court of Appeals has not been published. It is reproduced herein as Appendix A1-5.

2. The interlocutory opinion of the Ninth Circuit Court of Appeals in this matter was published at 890 F.2d 1453 (9th Cir. 1989) and was modified and the modifications published at 918 F.2d 1476 (9th Cir. 1990). The full opinion with modifications is reproduced herein as Appendix B1-19.

JURISDICTION

Plaintiff brought suit in admiralty alone, pursuant to F.R.Civ.P. 9(h) and 28 U.S.C. § 1333(1) in the District Court for the Central District of California in August 1984. Defendant Char Yigh Marine (Panama) S.A. was dismissed from the case with prejudice on 22 November 1991, but was ordered to continue as a third-party claimant. On 17 January 1992 the District Court granted summary judgment for $1 million against Char Yigh Marine (Panama) S.A. A timely appeal from that judgment was filed to the Ninth Circuit Court of Appeals.

A Not for Publication Memorandum issued from the Ninth Circuit on 8 March 1995 affirming the judgment of 17 January 1992 and remanding for further proceedings to calculate interest. A timely petition for

reconsideration was filed, and denied by order of 12 April 1995.

The Court's mandamus jurisdiction under 28 U.S.C. § 1651(a) is sought under Supreme Court Rule 20, inasmuch as the extraordinary situation has arisen where, in violation of mandatory procedures, the Ninth Circuit has refused to apply F.R.Civ.P. 25(c) or its own published precedent.

If this is a proper vehicle for certiorari under Supreme Court Rule 10.1(a) (that a United States court of appeals . . . has so far deviated from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision), this petition for certiorari is filed within 90 days of 12 April 1995 and is timely under Supreme Court Rules 13.1 and 13.4. The jurisdiction of this Court is then invoked pursuant to 28 U.S.C. § 1254(c).

SYNOPSIS

After seven years of very active litigation, in 1992 the District Judge dismissed Char Yigh (a dissolved Panamanian corporation) *sua sponte* for "lack of capacity" under F.R.Civ.P. 17(a) — and ordered Char Yigh's $1 million bond forfeited to plaintiff without trial.

In fact, F.R.Civ.P. 17(a) is the wrong federal rule. Because the corporate dissolution of Char Yigh occurred after Char Yigh had appeared and answered, the correct federal rule is F.R.Civ.P. 25(c): *Hilbrands v. Far East Trading Co., Inc.* (9th Cir. 1975) 509 F.2d 1321. Under Rule 25(c), it was reversible error to dismiss Char Yigh for lack of capacity.

The Ninth Circuit affirmed the District Judge's erroneous ruling in a "Not for Publication Memorandum" that refused to apply F.R.Civ.P. 25(a) or its own published precedent (Appendix A). The Not for Publication decision here is made more anomalous still because an earlier published decision in this very case held that Char Yigh had capacity to defend after its dissolution (Appendix B8, n.6).

Subsequent to the District Court decision here, another plaintiff, suing Char Yigh before another District Judge in the same District, moved to dismiss Char Yigh on the basis of lack of capacity under F.R.Civ.P. 17(a). That second District Judge ruled that Char Yigh had legal capacity (Appendix G). That decision is now on appeal.

Not for Publication decisions are entitled to collateral estoppel effect under Ninth Circuit Rule 36-3. Defendant believes it is probable that the reasoned opinion of the second District Judge will be summarily reversed unless this Court instructs the Ninth Circuit in this case to address published precedent on F.R.Civ.P. 25(c).

STATEMENT OF THE CASE

Plaintiff Interpool Limited is a Bahamian corporation which, in the years prior to 1984, entered into a series of contracts with a group of Taiwanese, Panamanian and Hong Kong corporations to sell and to lease a very large number of truck chassis and cargo containers to the group's subsidiaries. The group of lessees operated an international cargo carrying business using ships, railroads and trucks under the umbrella name of C.C. Line.

In 1984 C.C. Line was unable to pay its equipment rental to Interpool, and entered into a confession of judgment to pay $1,321,863, together with a schedule of

payments. It then defaulted on that schedule so, in July of 1984, Interpool filed suit in New York on the confession of judgment and obtained a judgment of $1,181,863 against the various C.C. Line entities (Appendix C).

C.C. Line then went out of business, and Interpool and a large number of other creditors engaged in a flurry of litigation. In Los Angeles, in the Central District of California, Interpool sued C.C. Line *in personam* and, in a separate series of cases, Interpool and other lessors arrested the vessel C.C. SAN FRANCISCO *in rem* for tens of millions of dollars of unpaid lease payments. (Eventually, in *Foss Launch & Tug Co. v. C.C. SAN FRANCISCO*, (9th Cir. 1987) 808 F.2d 697, all these arrests were set aside for lack of maritime lien status, although the panel did hold that a contract for supply of containers to a vessel was a maritime contract).

Interpool amended its complaint here against C.C. Line to allege that Char Yigh Marine (Panama) S.A. was a contract guarantor to Interpool of the C.C. Line obligations. Using that allegation, Interpool compelled Char Yigh to file a $1 million bond to release its vessel, C.C. SAN FRANCISCO. The bond remains in effect, and is the focus of this litigation. The bond requires a finding of the extent of C.C. Line's attachable interest in C.C. SAN FRANCISCO, and a judgment after appeal against any of the C.C. Line defendants in this case.

Char Yigh appeared, and answered the complaint in October 1984. All remaining defendants were reportedly served, and their defaults were taken. Interpool then filed statements under oath that its damages were $7,934,850.00 and obtained *ex parte* default judgments for that sum against the defaulting defendants.

Thereafter Char Yigh's investigation disclosed that prior judgments on the same contracts against the same defendants existed in Interpool's favor in the Southern

District of New York. Char Yigh moved to set aside the default judgments and to dismiss the present case on merger by judgment grounds with reference to the Southern District of New York judgment of July 1984. The motion to set aside the default judgments was granted; the merger by judgment motion was denied and was preserved for appeal.[1]

During the proceedings on March 30, 1995, Char Yigh, a Panamanian corporation, filed a certificate of dissolution in the Panamanian official record. This was reported to Judge Curtis by Char Yigh in Answers to Interrogatories (Appendix D9) as follows:

> "The effect of dissolution is to alter the status of these members of the Board of Directors at the time of dissolution into trustees of the affairs of Char Yigh. Under Panamanian law, trustees have power to continue to deal with all matters pertinent to the winding up of the affairs of Char Yigh, including this litigation, for as long as is necessary after the institution of dissolution proceedings."

Interpool was, in its turn, engaged in multiple motion practice, and sought to increase the amount of the bond from $1 million to $7.9 million, and to require an independent unserved party (SB General Leasing, Japan) to post this new security. In denying these motions Judge Curtis determined he had been wrong to conclude that a right to security existed — so he vacated his order (but not the security), and certified the question for interlocutory appeal. All further activity was stayed pending

---

[1] The merger by judgment issue remains vital because Interpool advises that its Southern District of New York judgment has since been satisfied in full.

the outcome of the interlocutory appeal, which was limited to the "right to attach."

The unanimous ruling of the Court of Appeals was that Interpool had alleged a theory on which a right to attach order could issue, but that Judge Curtis had not completely determined whether a right to attach order should issue. The case was remanded for a determination whether a right to attach order should issue, and for trial: *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*, (9th Cir. 1989) 890 F.2d 1453 *modified* (9th Cir. 1990) 918 F.2d 1476 (Appendix B). On remand, the case was transferred to the calendar of Senior District Judge Irving Hill since Judge Curtis had retired.

As part of the interlocutory opinion, the panel had found: "Char Yigh was dissolved while this action was proceeding (Panamanian law allows the continued defense of litigation after dissolution) and thus has no assets with which to increase Interpool's attachment security." *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.* (9th Cir. 1989) 890 F.2d 1453, 1457, n.6. It was clear that the $1 million bond was alone at stake and that Char Yigh had capacity to defend it.

As a result of admissions made by Interpool in the interlocutory appeal that Interpool had never had a cause of action in August 1984 against defendant Char Yigh, Judge Hill dismissed Char Yigh as a defendant, with prejudice, on November 22, 1991, but refused to exonerate Char Yigh's security.[2]

Inasmuch as Char Yigh was dismissed with prejudice as a defendant, but had a $1 million bond still at stake, he authorized Char Yigh to file a "third party claim" (a California attachment pleading) before the next hearing,

---

[2] No formal order of dismissal was signed, but the Court's docket sheet confirms that dismissal was ordered that day.

to protect its interest in its bond. In this November hearing, Judge Hill raised a question of capacity: "Something in the papers leads me to believe that Char Yigh is not even an existing entity at this time." Thereafter, Interpool moved for summary judgment, but not on issues of capacity. Char Yigh filed objections, and Interpool in its reply papers (on December 26, 1991) objected to Char Yigh's "capacity" for the first time in seven years of litigation. No formal motion was ever made.

On January 10, 1992, Char Yigh filed its "Involuntary Claim" as required by Judge Hill in November 1991. Paragraph 1 of that claim (Appendix E3) states:

> "Involuntary Third-Party Claimant CHAR YIGH at all relevant times prior to March 30, 1985 was a foreign corporation extant and existing under the laws of the Republic of Panama. **CHAR YIGH, having been dissolved under the laws of the Republic of Panama, now acts through trustees** with the intent of protecting and preserving the initial corporate assets, and of recovering damages and costs of defense from Interpool. Inasmuch as this proceeding was brought prior to the dissolution of CHAR YIGH, and has been contested by CHAR YIGH during and within three years of its dissolution, no prescriptive period applies to the defense of this action, and CHAR YIGH possesses legal capacity to defend and to prosecute its interests. Subject to the affirmative defenses below that no service has been properly made, service

> by mail of all subsequent pleadings in this action may be made on Williams Woolley Cogswell Nakazawa & Russell, 200 Oceangate, Suite 700, Long Beach, California 90802-4333, attention David E. R. Woolley." (Emphasis added.)

Prior to the hearing, Char Yigh filed a memorandum and obtained a statement under oath from Panamanian counsel that, under Panamanian law, Char Yigh (or its trustees in Char Yigh's name) were allowed to continue litigation pre-existing the dissolution. Judge Hill refused to read this declaration, and struck the filing.

At the hearing on 13 January 1992, Interpool submitted declarations of its personnel as to the character of the contracts, that they were breached on August 1, 1984 and that damages of $5,768,366.49 had been incurred.[3]

Judge Hill entered default judgment for $5,768,366.49 against the 23 C.C. Line defendants in default, plus interest. He then declared that Char Yigh lacked legal capacity to appear or defend, struck Char Yigh's third party claim (which he had in November instructed be filed), and then entered summary judgment for $1 million against non-defendant Char Yigh without interest (Appendix F). At this single hearing in 1992, the District Judge, without formal motion and despite a published opinion (Appendix B), denied Char Yigh further capacity to appear under F.R.Civ.P. 17, refused leave for its trustees to appear on its behalf and struck their pleadings.

---

[3] Interpool's sworn contract damages are variously $1,181,863, $7,934,850, and $5,768,366.49. Char Yigh cannot explain the different figures because Interpool has consistently refused to attend deposition.

Char Yigh and Interpool each appealed to the Ninth Circuit. Char Yigh appealed the entry of the $1 million judgment against it inasmuch as it had earlier been dismissed with prejudice. It appealed the ruling that it "lacked capacity to defend" under F.R.Civ.P. 17(a). It also appealed the earlier denial of its motion to dismiss for merger by judgment. Interpool appealed the refusal to order non-party SB General Leasing to post a $5.7 million bond, and the denial of interest on Char Yigh's $1 million judgment and bond.

During the appellate process, Char Yigh moved to dismiss for lack of admiralty subject matter jurisdiction on the grounds that the description of the lease contracts in the 1992 motion for summary judgment identified them as terrestrial leases of truck chassis and containers to corporations, and not as leases of containers to ships. Interpool opposed. The Ninth Circuit motion panel referred decision on the motion to the panel hearing the appeal.

A Not for Publication Memorandum decision issued from the panel hearing the appeal on March 8, 1995. The Memorandum did not address the subject matter jurisdiction motion or any of the issues raised on appeal by Char Yigh except for "lack of capacity." The Memorandum held that Judge Hill "correctly determined that Char Yigh Marine (Panama) S.A. was without capacity." The panel did not address F.R.Civ.P. 25(a), the *Hilbrands* case or the *Acme Granite* case except to state in a footnote that application of F.R.Civ.P. 25(a) had been waived.[4]

---

[4] Char Yigh concedes that the specific invocation of Rule 25(c) was belated, because Judge Hill had invoked Rule 17. Rule 25 was expressly invoked, with applicable case law, before the final ruling, and was not waived. The initial problem arose because spontaneous judicial rulings do not require the careful statement of thesis and antithesis that invigorates and validates formal motion practice. The

(continued)

The panel did not address its statement in the reported interlocutory opinion in this case that "Panamanian law allows the continued defense of litigation after dissolution." The panel found that no local rule of the Central District of California or federal rule forbade the district court from considering the capacity argument as raised (apparently overlooking the *res judicata* and law of the case effect of footnote 6 of its published opinion, Appendix B hereto).

The decision of the Memorandum was that "Judge Hill's summary judgment filed on January 17, 1992 against Char Yigh is affirmed" — despite the fact that on November 26, 1991 Judge Hill had dismissed Char Yigh with prejudice. Such a ruling is fundamentally illogical.

The Not for Publication Memorandum conflicts with Federal Rules, this Court's jurisprudence, the Ninth Circuit's prior reported precedent and the same panel's earlier published ruling in this very case. But it gets worse.

In August 1984, a stevedore and terminal operator, Crescent Wharf, arrested C.C. SAN FRANCISCO *in rem* in the Central District of California and secured a $334,000 bond. That case proceeded to trial before a different District Judge in August and September 1993, while the present case was on appeal. By motion *in limine* at trial, plaintiff invoked District Judge Hill's ruling as to Char Yigh's lack of capacity to defend. Briefing was held and declarations of Panamanian counsel filed. The trial court took the matter under

---

(fn. continued)
present problem has arisen because the panel here has refused to follow its own known precedent in violation of the basic rule of *Elder v. Holloway* (1994) __ U.S. __, 127 L.Ed.2d 344, 114 S.Ct. 1019, that a court engaging in review of questions of law should use its full knowledge of its own precedents. The applicability of F.R.Civ.P. 25(c) or Rule 17(a) is a simple question of law.

submission; in its final findings of fact and conclusions of law, this second District Judge, Judge Kenyon, being fully apprised of Senior District Judge Hill's ruling, held that Char Yigh had legal capacity to defend.

That case was then appealed so that there is another case on appeal involving Char Yigh Marine (Panama) S.A.: *Crescent Wharf, etc v. C.C. SAN FRANCISCO*, Ninth Circuit case 94-55830. At a Ninth Circuit settlement conference in that case, counsel for Crescent has advised that he intends to invoke the Not for Publication Memorandum to take advantage of the ruling on lack of capacity. Crescent's counsel wishes to invoke the Memorandum as collateral estoppel; and briefing in the appeal in 94-55830 has been stayed so that he may have that opportunity. Because of Ninth Circuit Rule 36-3 that a Not for Publication Memorandum may be used as collateral estoppel, Crescent's counsel in 94-55830 can avoid the district court's contrary ruling.

Inasmuch as Char Yigh is present in both cases, the Ninth Circuit will be faced with two, quite irreconcilable choices — either to adopt its published ruling in *Interpool* (Appendix B) that Char Yigh had capacity to defend (and thus silently overruling its Not for Publication Memorandum, Appendix A) or to adopt the Memorandum as collateral estoppel, disregarding its published findings. Since collateral estoppel is available against a defendant as to a point of law which he previously lost, Char Yigh faces substantial jeopardy here. However, inasmuch as the Not for Publication Memorandum is by definition not published, collateral estoppel would have to be applied in a further Not For Publication opinion, lest it be seen to contradict the published ruling in *Interpool*. This is an example in actual practice of the confusion that has been created by promulgating, by Memorandum, a novel legal principle that is in conflict with published opinions of the promulgating court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has refused to apply the mandatory provisions of F.R.Civ.P. 25(c) or its own published precedent to the actions of the District Judge below and, in that process, has declared after 11 years of litigation that petitioner Char Yigh must forfeit its $1 million bond to plaintiff Interpool even though the District Court has dismissed Interpool's case for damages against Char Yigh with prejudice.

The duty to follow published precedent is not discretionary within the Ninth Circuit. A panel is bound by decisions of prior panels unless an *en banc* decision, Supreme Court decision, or subsequent legislation undermines those decisions: *Montana v. Johnson* (9th Cir. 1984) 738 F.2d 1074, 1077; *U.S. v. State of Washington* (9th Cir. 1989) 872 F.2d 874 at 880. No such intervening circumstances exist in this case, and the panel is compelled to follow its prior *Acme Granite* and *Hilbrands* decisions. Furthermore, the very same panel of judges which wrote the published *Interpool* opinion in 1990 that Char Yigh has capacity to defend has disregarded its statement in reaching its Not for Publication decision here that Char Yigh does not have capacity. This is not permitted.[5]

Likewise, the duty to apply the appropriate federal rule is not discretionary:

> "These rules govern the procedure in the United States district courts in all

---

[5] The interplay between published and unpublished decisions in the same case is undecided, because Not for Publication rulings are a novel development. A simple rule can be stated that an unpublished opinion should adhere to the findings of a published opinion. If the published reasoning is erroneous, it should be publicly abrogated. If it is correct, then it should be followed.

> suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." F.R.Civ.P. 1.

As this Court has said, in the context of a summary dismissal: "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as that may be on occasion." *Surowitz v. Hilton Hotels Corp.* (1966) 383 U.S. 363, 373, 86 S.Ct. 845, 15 L.Ed.2d 807.

The fundamental purpose of the Federal Rules has been disregarded in this case. If the decision is permitted to stand, a defendant who has already been dismissed with prejudice will be forced to forfeit a $1 million bond to a plaintiff whose judgment has already been satisfied. This circumstance arises only because the Ninth Circuit refuses to apply the mandatory federal rule and refuses to acknowledge its own four-square precedent. In the exercise of its supervisory power, this Court should tell the Ninth Circuit to think again.

1. The Law is Not Being Obeyed

F.R.Civ.P. 25(c) governs this case, and requires that Char Yigh be allowed to continue to defend. This is not a matter within the discretion of the District Judge nor, in light of published Ninth Circuit precedent exactly on point requiring reversal of the District Judge's decision here, is it a matter in which the Court of Appeals has discretion to affirm the District Judge. It is a matter of adhering to the mandatory rules of procedure as promulgated by this Court.

Federal Rule of Civil Procedure 25(c) states:

> "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

Federal Rule of Civil Procedure 25(c) gave Judge Hill three choices — to allow Char Yigh to remain as defendant, to allow the trustees to substitute for Char Yigh (which was the point of the Involuntary Third Party Claim that was also stricken), or to have both in the case. Rule 25(c) did not give Judge Hill the power to dismiss the case, or to enter a spontaneous involuntary default judgment.

The application of this rule to corporations is clearly set out in a standard federal hornbook, with reference to this Court's own rulings.

> "If an interest has been transferred prior to commencement of the suit Rule 17, requiring that an action be brought in the name of the real party in interest and defining capacity to sue and be sued, is controlling. After suit is brought, Rule 25 becomes the relevant provision. The rule applies to ordinary transfers and assignments, as well as to corporate mergers.
>
> "If a corporation is wholly dissolved, rather than merged into some other entity, the matter is more complicated. The Supreme Court has said:

> 'most courts have held that the dissolution of a corporation works an abatement of pending actions.'
>
> " 'But a time-honored feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing.' (*Defense Supplies Corp. v. Lawrence Warehouse Co.* (1949) 336 U.S. 621, 634-5, 93 L.Ed. 931, 69 S.Ct. 762.)
>
> "The effect of corporate dissolution during the pendency of an action, therefore, must be determined by statutory law, which usually will be that of the state. If the substantive law allows the action to continue against the dissolved corporation or against those whom its assets have been transferred, Rule 25(c) becomes applicable." 7C Wright, Miller, Kane, Federal Practice and Procedure, Civil 2d Ed. 1986, § 1958 Transfer of Interest, pp. 553-554.

Panamanian law was stated to the Court (Judge Curtis) in 1986 in sworn answers to interrogatories signed by a trustee of Char Yigh (Appendix D). Judge Curtis accepted it.

> "Under Panamanian law, trustees have power to continue to deal with all matters pertinent to the winding up of the affairs of Char Yigh, including this litigation, for as long as is necessary after the institution of dissolution proceedings."

This law was then adopted as *res judicata* and law of the case by the Ninth Circuit in 1989 when Char Yigh was dissolved while this action was pending: "Panamanian law allows the continued defense of litigation after dissolution." *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.* (9th Cir. 1989) 890 F.2d 1453 at 1457 (Appendix B).

It was then also declared to Judge Hill in 1992:

> "CHAR YIGH, having been dissolved under the laws of the Republic of Panama, now acts through trustees with the intent of protecting and preserving the initial corporate assets, and of recovering damages and costs of defense from Interpool."

Panamanian law is clear even though Judge Hill rejected the record out of hand and disregarded the Circuit's "law of the case" statement. Char Yigh continues, in the "time-honored" fashion, to have "enough life remaining to litigate its actions."

The Memorandum ruling sustaining Judge Hill is in error, and the correct rule is stated in *Hilbrands v. Far East Trading Company, Inc.* (9th Cir. 1975) 509 F.2d 1321 at 1323. In that case, Mrs. Hilbrands was injured and sued her tortfeasor in District Court. After her suit was begun, she received a worker's compensation award. The tortfeasor then successfully obtained a summary judgment against her under F.R.Civ.P. 17(a) on the grounds that the compensation award had deprived her legal capacity to sue. The Ninth Circuit reversed.

> "The district court erred when, relying on Rule 17(a) F.R.Civ.P., it concluded Mrs. Hilbrands could not continue as plaintiff and granted summary judgment against her. Rule

> 17(a) would control if an interest was transferred prior to the commencement of the suit. Rule 25(c) F.R. Civ.P. applies if the transfer occurs during the pendency of the action. [citations omitted] Here the transfer occurred when Mrs. Hilbrands received her award from the Commission, which event occurred after the suit had been commenced. Thus Rule 25(c) governed."

Hilbrands, 509 F.2d at 1323.

The effect of Rule 25(c) in this case is demonstrated vividly by a Ninth Circuit case exactly on point: *United States for the use of Acme Granite & Tile Co. v. F.D. Rich Company, Inc.* (9th Cir. 1970) 437 F.2d 549, *aff'd on reconsideration* (9th Cir. 1971) 444 F.2d 1143.

In that case, Rich was the prime contractor (akin to Interpool here). It had two subcontractors, B & G (akin to C.C. Line) and Acme Granite (and Char Yigh is in Acme's position). Acme's surety posted a bond in Rich's favor (and Char Yigh's surety has posted a $1 million bond in favor of Interpool).

B & G's work was inadequate, causing Acme to delay in its own performance to Rich. It appears that B & G defaulted (just like C.C. Line) and so Rich and Acme engaged in litigation. As a result of a jury trial, judgment was entered for Acme and against Rich. (In the present case, after seven years of litigation, in November 1991, Interpool dismissed its suit against Char Yigh with prejudice.)

However, because Acme had dissolved during the litigation, the District Court determined that Acme had no capacity to defend its bond (just like Char Yigh). There was no successor corporation, but the two original

stockholders sought leave to appear — and were denied (just as Char Yigh's trustees were). The District Court therefore defaulted Acme and entered a new judgment in favor of Rich to be paid from the bond (and this is exactly what happened to Char Yigh).

The District Court was reversed on appeal for failing to apply F.R.Civ.P. 25(c) as it was intended to be applied. The Ninth Circuit emphasized that dismissal in such circumstances totally destroyed "valuable property rights" and was at odds with common sense. The opinion was scathing and explicit: a dissolved defendant should always be allowed to substitute in its successor, if at all feasible. *United States for use of Acme Granite & Tile Co. v. F.D. Rich Company, Inc.* (9th Cir. 1970) 437 F.2d 549 at 553.[6]

The Acme Granite case has a further point of interest. The Court was particularly attentive to the rights of the victimized bondsman, Fireman's Fund:

> "Fireman's Fund, as surety, is entitled to due process. The abatement of the action below appears, under all the circumstances, to have been unwarranted and prejudicial to Fireman's Fund as well as to Acme's stockholders": 437 F.2d at 553.

Fireman's Fund appears in the *Interpool* case as plaintiff, when it appeared as surety in *Acme Granite*. (It is believed and so asserted that Fireman's Fund has paid, and is subrogated to, Interpool's rights in this case.) Accordingly, the doctrine of issue preclusion applies

---

[6] On reconsideration it was affirmed that federal courts have ample authority to dispose of cases on their merits by the substitution of parties as necessary, even if the underlying state procedural law would have abated the action by the dissolved corporation: 441 F.2d at 1144.

against Fireman's Fund/Interpool, to prevent it from contesting the aptness of the result in *Acme Granite* or its application here: *Parkland Hosiery Co. v. Shore* (1979) 439 U.S. 332, 58 L.Ed.2d 552, 99 S.Ct. 645; *Kim v. Fujikawa* (9th Cir. 1987) 871 F.2d 1427 at 1433. It should apply, it does apply, and plaintiff is estopped to state otherwise.

2. The Memorandum Produces Grotesquely Aberrational Results

The Memorandum sustains a summary, even arbitrary, decision of the District Court that the active and protesting Char Yigh does not exist, and cannot defend, to the great damage of Char Yigh, of its bondsman and of the intention of the Federal Rules that "All pleadings shall be construed as to do substantial justice": F.R.Civ.P. 8(f).

The Memorandum allows Interpool to collect $1 million from Char Yigh even though it wrongfully sued Char Yigh in 1984, and was compelled to dismiss Char Yigh *with prejudice* in 1991. The Memorandum will allow Interpool to recover the $1 million plus eleven years of interest even though in July 1984, one month before initiating this lawsuit, Interpool recovered judgment against the C.C. Line defendants in New York for breach of the very same contract, and is wholly and utterly barred under the substantive doctrine of merger by judgment from any recovery whatsoever in the present action.[7] Indeed, the Southern District of New York judgment has been satisfied, so that Interpool cannot even allege residual damages.

---

[7] Merger by judgment is an absolute defense — *Mirin v. State of Nevada* (9th Cir. 1976) 547 F.2d 91, 94; *Eichman v. Fotomat Corp.* (9th Cir. 1985) 759 F.2d 1434, 1438.

A greater miscarriage of justice than a Court deliberately overlooking merger by judgment cannot be envisaged in a civil case, unless it is that the second, merged judgment be entered against a non-defendant: Char Yigh was dismissed as a defendant in November 1991 — yet judgment was entered against it in January 1992, and expressly confirmed in the Memorandum.

Finally, the Memorandum itself violates the same panel's own earlier, written, interlocutory opinion in this case — "Char Yigh was dissolved while this action was pending (Panamanian law allows the continued defense of litigation after dissolution) and thus has no assets with which to increase Interpool's attachment security." [8] This ruling has not been stricken, and is still the official, published law of the Ninth Circuit. Thus, the panel's own memorandum decision violates the fundamental and salutary principle of *res judicata*: *Federated Department Stores v. Moitie* (1981) 452 U.S. 394, 101 S.Ct. 2424, 63 L.Ed.2d 103. Char Yigh is in the anomalous position of having established a clear precedent that Panamanian law allows the continued defense of litigation after dissolution, while being barred by purely arbitrary rulings from invoking its own precedent.

With the latest version of a Not For Publication Memorandum at odds with an earlier published interlocutory appeal, and with the Memorandum at odds with the Ninth Circuit's own *Acme Granite* opinion and the *Hilbrands* opinion, we are caught in a never ending circle of contradiction. The circle will become larger when plaintiff's counsel in the *Crescent* case invokes the Not for Publication Memorandum against Char Yigh as collateral estoppel. The Circuit must either adopt its

---

[8] *Interpool, Ltd. v. Char Yigh Marine (Panama) S.A.* (9th Cir. 1989) 890 F.2d 1453, 1457.

published reasoning and so contradict its Not for Publication Memorandum, or adopt the Memorandum and contradict its reported authority in deciding the *Crescent* case.

The panel will have reached this position of contradicting itself in its determination to sustain the glaring error of a distinguished District Judge. In order to do so, it has ignored its own prior opinion in this case, has ignored four-square prior opinions of other panels, has disregarded a Federal Rule of Civil Procedure that is exactly on point, and has embraced wholeheartedly the most technical of technical traps, a belated claim of lack of capacity.

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper outcome on the merits.' "

Foman v. Davis (1962) 371 U.S. 178, 181, 9 L.Ed.2d 222, 83 S.Ct. 227.

CONCLUSION

This honorable Court is requested to issue its writ of mandamus to the United States Court of Appeals for the Ninth Circuit to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing the Ninth Circuit to vacate its Not for Publication decision of March 8, 1995, and to reconsider the issues in this case in light of Federal Rule of Civil Procedure 25(c) and published precedent.

In the alternative, this honorable Court is requested to issue its writ of certiorari to the same court, identifying Interpool Limited as respondent.

Dated: June 9, 1995.

Respectfully submitted,

WILLIAMS WOOLLEY COGSWELL
NAKAZAWA & RUSSELL

DAVID E. R. WOOLLEY
Counsel of Record

Attorneys for Petitioner
CHAR YIGH MARINE
(PANAMA) S.A.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 08 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

INTERPOOL LIMITED,
Plaintiff-Appellee,
v.
E.C. YANG,
Defendant,
and
CHAR YIGH MARINE (PANAMA) S.A.,
Defendant-Appellant.

No. 92-55339

D.C. No. CV-84-6333-IH

INTERPPOL LIMITED,
Plaintiff-Appellant,
v.
CHAR CHING MARINE (H.K.)
Co., Ltd., Char Hsing Marine Co., Ltd.;
E.C. Yang; Char An Marine (Panama) S.A.;
Char Che Marine (Panama) S.A.;
Char Cherng Marine (Panama) S.A.;
Char Chun Marine (Panama) S.A.;
Char Ning Marine (Panama) S.A.;
Char Fuh Marine (Panama) S.A.;
Char Hang Marine (Panama) S.A.;
Char Ho Hang Marine (Panama) S.A.;
Char Hoong Marine (Panama) S.A.;
Char Hui Marine (Panama) S.A.;

No. 92-55427

D.C. No. CV-84-6333-IH

Char Jin Marine (Panama) S.A.;
Char Lian Marine (Panama) S.A.;
Char Lo Marine (Panama) S.A.;
Char Ly Marine Char Suo Marine
(Panama) S.A.; Char Yeung Marine
(Panama) S.A.; Multi Carrier (Panama) S.A.;
C.C. Line Holding, Ltd.
Defendants,
and
CHAR YIGH MARINE (PANAMA) S.A.
Defendant-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Irving Hill, District Judge, Presiding

Argued and Submitted June 15, 1994
San Francisco, California

Before: WALLACE, CANBY, and TROTT, Circuit Judges.

This matter comes to us for the second time.[1] On this occasion, it returns from our order of remand in our opinion *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*, 890 F.2d 1453 (9th Cir. 1989). After an examination of the record and briefs of counsel, we hold that Judge Hill correctly determined that Char Yigh Marine

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. Rule 36-3.

[1] Char Yigh's Supplemental Facts on Rehearing are ordered filed.

(Panama) S.A. was without legal capacity. On November 22, 1991, Char Yigh acknowledged that no trustee was before this court (as Panamanian law requires). After dismissing Char Yigh as a defendant, Char Yigh filed as a third-party claimant. On a subsequent summary judgment ruling, Judge Hill held that Char Yigh lacked the capacity to sue as a third-party claimant. It is from this ruling that Char Yigh appeals, arguing that Interpool has waived the issue of capacity.

According to Federal Rules of Civil Procedure 9(a), capacity must be raised by "specific negative averment." Failure to raise a capacity defense can constitute waiver of that defense. *See Summers v. Interstate Tractor and Equip. Co.*, 466 F.2d 42, 49-50 (9th Cir. 1972). Legal capacity "generally does not affect the subject matter jurisdiction of the district court" and so it can be waived. *Id.* at 50. However, the issue of third-party claimant capacity did not arise in this case until after our *Interpool* decision which established that Char Yigh was not the "true owner" of the vessel C.C. San Francisco for the purposes of this litigation. *Interpool*, 890 F.2d at 1460. Therefore, any failure to raise the issue prior to our *Interpool* decision is irrelevant. The only question is whether Interpool properly raised the issue after remand.

Interpool did raise the issue of whether Char Yigh had the legal capacity to sue as a third-party claimant in its reply memorandum on December 26, 1991. Char Yigh admits this much in its brief. [*See* Appellant's Opening Brief 37] No local rule of the Central District of California or federal rule forbids the district court from considering the capacity argument as raised, even if the district court might have ruled the issue waived. Certainly, the district court did not abuse its discretion by considering Char Yigh's legal capacity to sue as a third-party claimant. Therefore, Judge Hill's summary judgment filed on January 17, 1992, against Char Yigh is

affirmed.[2]

On cross-appeal, Interpool appeals the district court's refusal to substitute SBG Leasing Co. (Hong Kong), Ltd. as real-party-in-interest third-party claimant pursuant to Rule 17(a) of the Federal Rules of Civil Procedure. We have examined this argument and find it wanting. Judge Hill's ruling was neither based on a misapprehension of the law, nor did it constitute an abuse of discretion. On its face, Rule 17(a) applies to plaintiffs, not defendants. *See also* Cal. Code of Civ. Pro. § 720.510. Interpool sued the plethora of defendants; in the vernacular, everybody that appeared to have anything to do with this case. If Interpool had wished to proceed against SBG Leasing, it should have done so at the appropriate time and in the appropriate fashion rather than rely on a questionable construction of Rule 17(a) tendered at the eleventh hour in a lengthy series of proceedings.

Our holding in this respect moots Interpool's appeal from Judge Hill's denial of its request to increase the amount of security.

On the final issue of prejudgment interest, however, it appears that the district court overlooked language in the bond as well as the Letter of Undertaking. Because we cannot find sufficient support in the record for the proposition that prejudgment interest was waived, and because prejudgment interest is awarded in a case such as this as a matter of course, *see Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789 (9th Cir. 1980), we vacate the district court's denial of prejudgment interest

---

[2] Char Yigh's Motion for Leave to File a Supplemental Legal Brief is Denied as untimely. Char Yigh's failure in its earlier submissions to predicate an argument, or to file a motion based on Fed. R. Civ. Pro. § 25(c) constitutes a waiver of any such claim.

and remand for reconsideration on this issue.[3]

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

The parties shall bear their own costs of this appeal.

---

[3] We leave to the district court the interpretation of the bond's clause regarding interest.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERPOOL LIMITED, *Plaintiff-Appellant,* v. CHAR YIGH MARINE (PANAMA) S.A., *Defendant-Appellee.*	No. 87-6643 D.C. No. CV-84-6333-JWC OPINION

Appeal from the United States District Court
for the Central District of California
Jesse W. Curtis, District Judge, Presiding

Argued and Submitted
January 11, 1989—Pasadena, California

Filed December 4, 1989

Before: J. Clifford Wallace, William C. Canby, Jr. and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

OPINION

TROTT, Circuit Judge:

In this admiralty, breach of contract action, Interpool, Ltd. ("Interpool") appeals the district court's order vacating its previous order granting Interpool's application for a right to attach the vessel C.C. San Francisco. Jurisdiction is proper and the appeal is timely. We vacate the district court's (second) order and remand for further proceedings consistent with this ruling.

BACKGROUND

Between July, 1978 and January, 1983, Interpool (a Bahamian corporation) entered into a series of written agreements with Char Ching Marine (a Hong Kong corporation) and its related Taiwanese, Hong Kong, and Panamanian companies, which operated collectively as C.C. Line. These agreements provided that Interpool would lease cargo containers to Char Ching Marine to be used by C.C. Line in connection with its transpacific shipping service between ports in Asia and the United States.

One of the container-carrying vessels in the C.C. Line was the C.C. San Francisco. Instead of obtaining a straightforward ship mortgage for the vessel, C.C. Line financed the C.C. San Francisco by a series of transactions whereby C.C. Line became the lessee of the ship and a third party—owned by a lending institution—became the vessel's owner.[1] The manner in which the C.C. San Francisco was financed is worth describing in detail because it is at the center of this appeal.

---

[1]For a general description of the use of this sort of "tripartite arrangement" in ship financing, see G. Gilmore and C. Black, *The Law of Admiralty* 704-5 (1975).

E.C. Yang, the chairman of C.C. Line, formed Char Yigh Marine, S.A. ("Char Yigh")(a Panamanian corporation) on October 15, 1982. Shortly thereafter Char Yigh entered into a contract with a Japanese dockyard for the construction of the C.C. San Francisco. The purchase price of the C.C. San Francisco was 3,990,000,000 Japanese yen. Char Yigh obtained ~~virtually~~ all of this amount in loans from Sumitomo ~~Bank or from its ship financing subsidiary, Sumitomo Bank General Leasing ("SBG Leasing")(a Hong Kong corporation). Sumitomo Bank made roughly a 300,000,000 yen loan to Char Yigh in order to enable Char Yigh to make a down payment on the C.C. San Francisco.~~ And, after delivery of the vessel, SBG Leasing loaned Char Yigh another 3,605,000,000 yen so that purchase might be completed.

By the time SBG Leasing made this second loan to Char Yigh, SBG Leasing owned Char Yigh. Two transactions had taken place immediately upon delivery of the vessel. First, SBG Leasing had purchased all shares of Char Yigh from C.C. Line for $1,000. Second, Char Yigh had entered into a charter party[2] with Char Jin Marine, S.A. (a Panamanian corporation), another C.C. Line entity, whereby Char Jin would lease the C.C. San Francisco from Char Yigh and purchase the vessel on expiration of the charter. The loan agreement between SBG Leasing and Char Yigh was expressly conditioned on these transactions having taken place.

The charter party between Char Jin and Char Yigh required Char Jin to make a series of forty "charterhire payments" to Char Yigh. The aggregate of these payments, the charter stipulated,

> shall be equal to the Purchase Price of the Vessel paid by [Char Yigh] under the Shipbuilding Con-

[2]A "charter party" is a type of maritime contract whereby one person, the "charterer," takes over the use of a ship belonging to another, the "owner." G. Gilmore & C. Black, *The Law of Admiralty*, § 4-1 (1st ed. 1957).

> tract plus interest thereon at a rate equal to the aggregate of the Japanese Long-Term Prime Rate as determined by [Char Yigh] prevailing one month prior to delivery of the Vessel and 1.50 per cent per annum on the basis of the whole of such sum being amortized over the term of the Charter Period.

The obligation to make these payments was "absolute unconditional." In addition, at the expiration of the charter Char Jin was required to purchase the vessel from Char Yigh by making a payment of 1,000,000,000 yen together with all other amounts due and payable under the charter.

In return for reimbursing Char Yigh for the purchase price of the vessel plus interest, Char Jin received control over and responsibility for the C.C. San Francisco. The charter provided that Char Jin would have exclusive possession of the vessel and must "man, bunker, and supply the vessel at [its] own expense." Char Jin was also charged with paying all costs incidental to use of the vessel, maintaining the vessel, insuring the vessel, and paying all taxes on the vessel. The entire risk of damage, loss, theft, destruction, or requisition of the vessel lay with Char Jin. Moreover, Char Jin indemnified Char Yigh from all "costs, liabilities, losses, expenses, damages, injuries, claims, demands, charges, taxes, levies, suits, proceedings (civil and criminal), judgments, awards, fines, sanctions, or penalties incurred in, arising from or incidental to the use, hire, lease, charter ownership, operation and maintenance of the vessel (and the replacement of all parts) . . . ."

To summarize, the C.C. San Francisco was financed by the following series of transactions. One C.C. Line entity, Char Yigh, agreed to purchase the C.C. San Francisco. A lending institution, SBG Leasing, purchased Char Yigh on the date the vessel was delivered and then loaned Char Yigh most of the purchase price of the vessel. Char Yigh did in fact purchase the ship, and is listed as owner on the ship's Panamanian certificate of registration, but it stood to recapture the

entire purchase price plus interest from another C.C. Line entity, Char Jin, which had agreed to charter or lease back the vessel. This second C.C. Line entity had complete control over and responsibility for the C.C. San Francisco and was required to purchase the ship at the termination of the charter.

FACTS AND PROCEEDINGS BELOW

Shortly after the C.C. San Francisco went into service in 1984, C.C. Line failed to meet its contractual obligations to Interpool. At this point the C.C. San Francisco was at sea on the way from Yokohama to Long Beach. The captain disregarded a request from Char Yigh to return the vessel to Yokohama and took the vessel to Long Beach. On its arrival at Long Beach the C.C. San Francisco was arrested at the instance of Interpool, among other creditors.

Interpool had the C.C. San Francisco arrested on the basis of the maritime lien statute, which, at the time of arrest, provided:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by a suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C. § 971.[3] In order for Interpool to have had a valid maritime lien, its supply of cargo containers to C.C. Line would have had to have been a furnishing of necessaries to a

[3]This section was repealed effective January 1, 1989 and replaced by 46 U.S.C. §§ 31341 and 31342. Although the wording of the maritime lien provision has been changed, its substance remains the same.

vessel upon the order of a person authorized by the owner of the vessel. The disputable point was whether necessaries delivered to a fleet of vessels without specification of the exact vessel on which they would be used were furnished "to any vessel." The district court answered this question in the affirmative, holding that Interpool had a valid maritime lien against the C.C. San Francisco. *Flexivan Leasing, Inc. v. M/V C.C. San Francisco,* 628 F. Supp. 1077, 1080 (C.D. Cal. 1985) ("[C]onsistent with modern shipping practices, the Court holds that the delivery of containers to a fleet of vessels, without specification as to a specific ship, does not defeat a maritime lien where the actual use of those containers aboard a specific ship can be proved."). The Ninth Circuit, however, reversed the district court on the grounds that necessaries leased in bulk to the charterer of a group of vessels for unrestricted use on board the vessels in that group are not furnished to any particular vessel of the group. *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.,* 808 F.2d 697, 703 (9th Cir. 1987).

In August of 1984, concurrently with the ultimately unsuccessful maritime lien action, Interpool filed a complaint against Char Jin, Char Yigh,[4] and a long list of C.C. Line companies for breach of contract, conversion, and possession of personal property. Pursuant to this action, Interpool then filed an ex parte application for an order shortening the time in which to apply for a right to attach order and a writ of attachment. Char Yigh appeared in district court in September of 1984 to oppose this application.

At this hearing, Char Yigh argued that Interpool's counsel did not have "the slightest possibility of getting his right to

[4]Char Yigh figures in a somewhat confusing manner in this case. It is one of the list of named defendants in Interpool's August 20, 1984 complaint. Interpool acknowledges, however, that Char Yigh, in its capacity as a corporation owned by SBG Leasing, cannot be held liable for C.C. Line's breach of contract.

attach order in the end" because Char Yigh, not C.C. Line, was the registered owner of the C.C. San Francisco. Although ownership of the vessel by the defendant is not required for a maritime lien to issue, it is a necessary prerequisite of attachment. *See Swift & Co. Packers v. Compania Colombiana Del Caribe,* 339 U.S. 684, 693 (1949)("*Swift*"). In response to the uncertainty regarding the ship's ownership, and to concerns about the cost of continuing to keep the ship under arrest, Judge Cynthia Holcomb Hall, who was then the district judge presiding over this case, released the C.C. San Francisco upon a letter of undertaking issued on behalf of Char Yigh by the Sumitomo Bank in the sum of $1,000,000. The letter provided that the Sumitomo Bank would satisfy any in rem judgment against the C.C. San Francisco and any in personam judgment against Char Jin up to $1,000,000 so long as it did not exceed the value of the C.C. Line's attachable interest in the vessel. In February of 1985, the American Home Assurance Company issued a $1,000,000 bond as a substitute for the letter of undertaking.

Upon its release in September of 1984, the C.C. San Francisco sailed for Japan. After reaching Japan, the vessel was sold at auction by SBG Leasing.[5] It brought less than the balance Char Jin owed Char Yigh under the charter party.

On October 15, 1984, pursuant to California Code of Civil Procedure § 484.010, Interpool filed a full-fledged application for an order granting its right to attach the C.C. San Francisco. As noted above, ownership of the vessel by a C.C. Line entity is a threshold requirement for such an order. On December 5, 1984, the district court, Judge Jesse W. Curtis presiding, found that the charter between Char Yigh and

[5]When Char Jin defaulted on its payments to Char Yigh, Char Yigh failed to meet its loan obligations to SBG Leasing. Because Char Yigh had granted a mortgage, which was not recorded until just before the C.C. San Francisco was arrested, to SBG Leasing, SBG Leasing could foreclose upon this mortgage and sell the ship at auction when it returned to Japan.

Char Jin was not a lease with a reversionary ownership interest but a disguised security instrument. He therefore granted Interpool's application for a right to attach order. The district judge indicated in the memorandum accompanying his order that further proceedings would be necessary to determine the relative priority of Sumitomo Bank's claim on the C.C. San Francisco. A variety of motions from both sides and extensive discovery on the relationship between SBG Leasing and Sumitomo Bank followed in the wake of Judge Curtis's memorandum.

On September 15, 1986, Interpool filed a motion requesting an order substituting SBG Leasing for Char Yigh as real party in interest claimant to the vessel and directing SBG Leasing to increase Interpool's security for the C.C. San Francisco.[6] In response to this motion, the district judge decided to reconsider whether a C.C. Line entity had an ownership interest in the C.C. San Francisco at the time of its arrest in Long Beach. Although he reiterated his earlier conclusion that "the financial scheme under which E.C. Yang and his associates used Char Yigh and SB General Leasing to finance the vessel was as intended essentially a security transaction," Judge Curtis found that "[s]ince Char Yigh had canceled the charter party, Char Jin and C.C. Line Holding Group had no attachable interest in the vessel at the time of attachment." He therefore issued a memorandum and order reversing his earlier order granting Interpool's right to attach the C.C. San Francisco and denying Interpool's motions. On March 3, 1987, Interpool timely appealed this order.

[6]Char Yigh was dissolved while this action was pending (Panamanian law allows the continued defense of litigation after dissolution) and thus has no assets with which to increase Interpool's attachment security.

DISCUSSION

Jurisdiction Below

The district court had jurisdiction over all three elements of the case before us: the underlying breach of contract action, the application for a right to attach order, and the question of the C.C. San Francisco's ownership. Container leases such as those between Interpool and C.C. Line companies are maritime contracts within the ambit of federal admiralty jurisdiction. *See Foss Launch & Tug Co. v. Char Ching Shipping U.S.A.*, 808 F.2d 697, 699 (9th Cir. 1987). Under Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure[7] ("Supplemental Rule B"), in any admiralty or maritime claim in personam, if the defendant shall not be found within the district, "the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property." This circuit has upheld the constitutionality of supplemental Rule B. *See Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982). The Supreme Court has held that admiralty jurisdiction further extends to the determination of ownership of an attached vessel even if that determination involves the court in the examination of transactions that are "intrinsically nonmaritime":

> Disputes over ownership of attached vessels are of course inevitable since only the respondent's property may be attached .... Inevitably such disputes may involve transactions not themselves the subject

[7]The Supplemental Rules were promulgated by the Supreme Court and enacted by Congress in 1966. *See Schiffahrtsgesellschaft Leonhardt & Co. v. Bottachi S.A. de Navegacion*, 773 F.2d 1528, 1533 (11th Cir. 1985); 7A J. Moore & A. Palaez, *Moore's Federal Practice*, ¶ B.01[2](2d ed. 1988). For a short history of maritime attachment and Supplemental Rule B, *see Schiffahrtsgesellschaft Leonhardt & Co. v. Bottachi S.A. de Navagacion*, 732 F.2d 1543, 1546-48 (11th Cir. 1984).

> matter of an independent libel.[8] If jurisdiction be wanting in a court of admiralty when such a controversy arises in the context of an attachment made in a libel over which the court indubitably has jurisdiction, a congenital defect would have to be attributed to the ancient process of foreign[9] attachment.

Swift, 339 U.S. at 693-94.

Appellate Jurisdiction

To be appealable, an order must either be final or fall into a specific class of interlocutory orders that are made appealable by statute or jurisprudential exception. *Save the Bay v. United States Army*, 639 F.2d 1100, 1102 (5th Cir. 1981). Judge Curtis's order vacating the right to attach order previously granted is clearly not the final decision pertaining to this litigation. Nevertheless, it is appealable under a jurisprudential exception to the final order rule: the *Cohen* collateral order doctrine. *See Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541 (1948)("*Cohen*").

Cohen held that an order other than a final judgment is properly appealable if it "finally determine[s] claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. In *Swift*, the Court held that *Cohen* allows appeal of an order vacating attachment of a vessel. 339 U.S. at 688-89. The Court based this extension of *Cohen* on the finding that, if appellate review of the order dissolving the attachment were postponed

---

[8]In the parlance of admiralty law, a "libel" is a complaint. *See* G. Gilmore and C. Black, *The Law of Admiralty*, §§ 1-12 (1st ed. 1957).

[9]A "foreign" attachment is an attachment of goods of a nonresident defendant or of a defendant who is beyond the territorial jurisdiction of the court. H. Black, *Black's Law Dictionary* 115 (1979).

until after that order had taken effect, restoration of the attachment would be only theoretically possible. *Id.* at 689.

This reasoning provides a basis for our jurisdiction over the district court's order vacating Interpool's right to attach the C.C. San Francisco. We recognize that Judge Curtis's order, unlike the order in *Swift,* vacates the attachment of a vessel which has already been released on security. We reject appellee's contention, however, that *Swift*'s reasoning cannot apply to such an order. *Cf. Polar Shipping Ltd. v. Oriental Shipping Corp.,* 680 F.2d 627, 630 (9th Cir. 1982)(holding that an order vacating attachment of freight charges in an admiralty case is appealable). In the circumstances of this case, it would be extremely complicated to restore security for the C.C. San Francisco once it had been released. The vessel's ownership is a complex affair. Char Yigh has been dissolved and has no assets with which to post security. And, finally, neither Char Yigh nor SBG leasing retains possession or title to the vessel. *Cohen* and *Swift* thus afford us jurisdiction over this appeal.

Choice of Law

This case involves a Bahamian plaintiff who seeks to attach a Panamanian ship arrested in California but leased by a Panamanian company (under a charter purporting to be governed by Hong Kong law) from another Panamanian company owned by a Hong Kong subsidiary of a Japanese bank. We therefore confront choice of law issues at the outset. We must determine both the basis on which to rest our choice of law and the proper law to apply. The district judge relied on California law to supply a conflict of law rule and, pursuant to that rule, applied California law.[10] We review these

[10]California uses a situs test to determine the proper law to apply to secured transaction questions. *See Joint Holdings & Trading Co., Ltd. v. First Union National Bank of North Carolina,* 50 Cal. App. 3d 159, 164, 123 Cal. Rptr. 519, 523 (Cal. Ct. App. 1975). The C.C. San Francisco was in California at the time of attachment, and the security substituted for the ship is in California. Thus, California law dictates that we apply California law.

decisions de novo. *See Pereira v. Utah Transport,* 764 F.2d 686, 689 (9th Cir. 1985).

First we must decide which country's law to apply. Char Yigh argues that the charter party's choice of Hong Kong law should be determinative. However, neither party has offered any evidence of any foreign law or how it would apply to this transaction. Where no authority, or insufficient authority, is presented by the parties about foreign law, a court may conclude that the parties have acquiesced in the application of the law of the forum. *Commercial Insurance Co. of Newark v. Pacific Construction Co.,* 558 F.2d 948, 952 (9th Cir. 1977). Accordingly, we apply American law.

We next determine whether the transaction is governed by federal or state law. The Federal Ship Mortgage Act establishes the rights of parties in maritime commercial instruments. The Act is intended to supplant state law on all issues to which it speaks directly. However, the language of the Act does not address the legal issues contested here. In the absence of controlling language in the federal statute, it is unclear as to the proper source of authority. One possibility is that we should next look to state law—in this case, that of California. Alternatively, we might apply federal common law of admiralty. Gilmore and Black state that this question has not been satisfactorily resolved by any court. G. Gilmore and C. Black, The Law of Admiralty 718-22.

We need not decide this difficult issue in this case. In maritime commercial transactions, the Uniform Commercial Code is taken as indicative of the federal common law of admiralty. *Id.* at 721. On the issues before us, the relevant California statute, Cal. Com. Code § 1201, is identical to its U.C.C. counterpart. In such circumstances, "[i]t makes not the slightest difference whether [the U.C.C.] is applied directly as state law or indirectly or analogically as a statement of what the federal law of ship mortgages would be if there was a federal law of ship mortgages." *Id.* We therefore

look to the identical provisions of Cal. Com. § 1291 and of U.C.C. article 1, section 201.

C.C. Line's Interest in the C.C. San Francisco at the Time of Arrest.

[1] Although the manner in which C.C. Line financed the C.C. San Francisco has been a common method of ship financing since World War II, few courts have directly discussed the nature of the parties' rights in the underlying property in these circumstances. *See* G. Gilmore and C. Black, *The Law of Admiralty* 704-05 (1975); *In re Captains Courageous,* 21 B.R. 134, 136-38 (Bnkr. N.D. Cal. 1982); *In re Merritt Dredging Co.,* 839 F.2d 203, 208-09 (4th Cir. 1988). Courts have, however, considered this issue in other contexts. *See, e.g., In re Pacific Express, Inc.,* 780 F.2d 1482 (9th Cir. 1986) (telecommunications equipment); *In re J.A. Thompson,* 665 F.2d 941 (9th Cir. 1982)(machinery).

In considering the interests of parties to a lease agreement in the underlying property, courts begin by determining whether the agreement is a security instrument or a true lease. *See id.* The California Commercial Code draws the distinction between a security interest and a lease as follows:

> "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation . . . . Unless a lease or consignment is intended as security, reservation or title thereunder is not a "security interest" . . . . Whether a lease is intended as security is determined by the facts of each case; however (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consider-

> ation or for a nominal consideration does make the lease one intended for security.

Cal. Comm. Code § 1201(37); *see also* Uniform Comm. Code § 1-201(37). Two aspects of this provision are especially relevant to determining the nature of the charter party between Char Yigh and Char Jin. First, whether a lease agreement is a true lease or one intended for security depends on the intention of the parties at the time of execution of the agreement. *In re J.A. Thompson,* 665 F.2d at 947. Subsequent events, such as default of the lessee, cannot affect the character of the agreement or the interests of the parties thereunder. *Id.* Second, although a provision for purchase for no additional consideration or for nominal consideration renders the agreement a security instrument as a matter of law,[11] the absence of such a provision will not prevent the court from finding that a "lease" is really a disguised security instrument if the intention of the parties supports such an interpretation. As this court stated in *In re Berez,*

> The true nature of a transaction is determined by the evidence and not by what the parties represent themselves to be doing .... No other purpose for [this] transaction is evident other than for him to borrow money from the buyer-lessor using his property as collateral. The absence of a purchase option in a lease does not preclude a finding that the lease was actually a disguised security loan.

646 F.2d 420, 420-21 (9th Cir. 1981).

[2] It is a basic principle of commercial law that, if a document purporting to be a lease is in fact part of a security arrangement, the "lessor" does not have a reversionary own-

[11] *See In re J.A. Thompson,* 665 F.2d at 947; *In re Captains Courageous,* 21 B.R. 134, 136 (Bankr. N.D. Cal. 1982), *vacated on other grounds,* 29 B.R. 22 (Bankr. N.D. Cal. 1983).

ership interest in the subject of the "lease." *See In re Pacific Express, Inc.*, 780 F.2d 1482, 1484-85 (9th Cir. 1986)("The formal retention of the title in a security lease serves only to reserve a security interest."); *In re J.A. Thompson*, 665 F.2d 941, 945 (9th Cir. 1982). The "lessee" rather than "lessor" is viewed as the owner. *See In re Pacific Express, Inc.*, 780 F.2d at 1486 ("Because the purported 'lease' was not a true lease but a security arrangement, [the "lessee"] owned the equipment on the date of bankruptcy."). As noted, events subsequent to the execution of the agreement cannot affect its character or the interests of the parties thereunder. Thus, the "lessee" will still be viewed as the owner even if the "lessee" made none of the required "lease" payments by the date of bankruptcy, *see id.*, and even if the "lessor" attempted to repossess the subject of the "lease" before other creditors levied claims upon it. *See In re Thompson*, 665 F.2d at 944-45.

The district court held in both its first and second orders that the agreements among Char Yigh, SBG Leasing, and Char Jin were intended to constitute a security instrument. In its second order the district court further found that the fact that Char Yigh had cancelled the charter party at the time of arrest robbed C.C. Line of its attachable interest in the C.C. San Francisco. The district court's finding that the charter party is part of a security arrangement is a finding of fact which we review under the clearly erroneous standard. The legal status of the holder of a security interest upon cancellation of the "lease" is, however, a question of law reviewable de novo. *See Gomez v. City of Watsonville*, 863 F.2d 1407, 1411 (9th Cir. 1988).

The facts described in the first section of this opinion reveal the district judge to have correctly determined that the charter party was intended as a security instrument rather than as a true lease. The SBG Leasing-owned Char Yigh clearly had no interest in actual ownership of the C.C. San Francisco. The charter conveying complete control over and responsibility for the vessel to Char Jin took effect at the moment SBG

Leasing purchased Char Yigh. And the charter provided for payments equal to the purchase price of the vessel plus interest and for mandatory purchase of the ship by Char Jin at the end of the charter period. There was thus to be no period in which the SBG Leasing-owned Char Yigh actually had possession or control over the C.C. San Francisco. To paraphrase *In re Berez,* it is difficult to conceive of another purpose for this transaction than for C.C. Line to borrow money from SBG Leasing using the C.C. San Francisco as collateral. *See* 646 F.2d at 421. Char Yigh's president, Mr. Uchida, admitted in his testimony that the purpose of the financing arrangement's structure was to give SBG Leasing greater security than it would have had under a preferred ship mortgage from Char Jin.

[3] Because Char Yigh and Char Jin intended the charter party as a security instrument at the time of execution, we must consider Char Jin to be the true owner of the vessel. *See In re Pacific Express,* 780 F.2d at 1484-86. Subsequent events could not have changed the character of the agreement or robbed Char Jin of its corresponding ownership interest in the C.C. San Francisco. *See In re J.A. Thompson,* 665 F.2d at 947. The fact that Char Yigh is listed as owner on the vessel's registration certificate does not undermine this analysis. Neither California nor federal law regards registration as conclusive proof of ownership. *See Chartered Bank of London v. Chrysler Corp.*, 115 Cal. App. 3d 755, 761, 171 Cal. Rptr. 748, 751 (Cal. Ct. App. 1981); *see also* 46 U.S.C. § 12104(3); *ITT Indus. Credit Co. v. M/V Richard C.,* 617 F. Supp. 761 (D.C. La. 1985)("The ownership of a vessel is not dependent on its registration.").

[4] We thus conclude that the district judge erred in concluding that cancellation of the charter party prior to the arrest of the C.C. San Francisco could affect, let alone destroy, C.C. Line's interest in the vessel. C.C. Line had an attachable interest in the C.C. San Francisco at the time of its arrest in Long Beach. To hold otherwise would be to grant

Char Yigh a more privileged status than that assigned other "lessors" simply because this case involves the financing of ships rather then of, for example, telecommunications equipment or machinery. We do not believe there to be a reasonable basis for affording the holder of a security interest in a ship greater security than the holder of a security interest in other property.

CONCLUSION

[5] Ownership of a vessel by a defendant is a threshold requirement for the right of the defendant's creditors to attach the vessel. The district court incorrectly found that this threshold requirement had not been met and therefore did not engage in a full analysis of whether Interpool has the right to attach the C.C. San Francisco.[12] We therefore VACATE the district court's order vacating its previous order granting Interpool's right to attach the C.C. San Francisco and REMAND for full consideration of whether Interpool possesses such a right. Appellant is entitled to its costs. VACATED and REMANDED

[12]Although we leave for the district court the task of determining whether Interpool had a right to attach the vessel, we wish to note the erroneousness of appellee's contention that California law prohibits attachment of foreign-owned vessels. Section 488.475 of the California Code of Civil Procedure permits the attachment of tangible personal property in control of a levying officer. The C.C. San Francisco was in control of a levying officer, a U.S. Marshal, at the time of attachment.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERPOOL LIMITED,
Plaintiff-Appellant,
v.
CHAR YIGH MARINE (PANAMA) S.A.,
Defendant-Appellee.

No, 87-6643
D.C. No. CV-84-6333-JWC

ORDER

Filed November 28, 1990

Before: J. Clifford Wallace, William C. Canby, Jr. and Stephen S. Trott, Circuit Judges.

The panel in this case has voted to amend its December 4, 1989 opinion as follows:

At page 14055, the fourth sentence of the first full paragraph shall read:

> Char Yigh obtained virtually all of this amount in loans from SB General Leasing (Hong Kong) Co., Ltd., ("SBGL Hong Kong"), a Hong Kong corporation, and a ship financing subsidiary of a member of the Sumitomo Bank group.

At page 14055, the fifth sentence of the first full paragraph shall read:

> SBGL Hong Kong made roughly a 300,000,000 yen bridge loan to Char Yigh in order to enable Char Yigh to make a down payment on the C.C. SAN FRANCISCO.

At page 14055, the sixth sentence of the first full paragraph shall read:

> And, upon delivery of the vessel, SBGL Hong Kong loaned Char Yigh another 3,605,000,000 yen so that purchase might be completed.

Thereafter in the opinion, the phrase "SBG Leasing" shall be changed each time it appears to "SBGL Hong Kong."

With the opinion so amended, the panel has voted unanimously to deny the petition for rehearing and to reject the suggest for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has called for a vote on the issue. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
S. D. OF N. Y.
FILED
AUG 13 1984

INTERPOOL, LIMITED,
Plaintiff,

vs.

CHAR CHING MARINE (H.K.) CO., LTD.,
CHAR HSING MARINE CO., LTD.,
E.C. YANG, CHAR AN MARINE (PANAMA) S.A.,
CHAR CHE MARINE (PANAMA) S.A.,
CHAR CHERNG MARINE (PANAMA) S.A.,
CHAR CHUN MARINE (PANAMA) S.A.,
CHAR NING MARINE (PANAMA) S.A.,
CHAR FUH MARINE (PANAMA) S.A.,
CHAR HANG MARINE (PANAMA) S.A.,
CHAR HO HANG MARINE (PANAMA) S.A.,
CHAR HOONG MARINE (PANAMA) S.A.,
CHAR HUI MARINE (PANAMA) S.A.,
CHAR JIN MARINE (PANAMA) S.A.,
CHAR LIAN MARINE (PANAMA) S.A.,
CHAR LO MARINE (PANAMA) S.A.,
CHAR LY MARINE (PANAMA) S.A.,
CHAR SUO MARINE (PANAMA) S.A.,
CHAR TAI MARINE (PANAMA) S.A.,
CHAR YEH MARINE (PANAMA) S.A.,
CHAR YEUNG MARINE (PANAMA) S.A.,
MULTI-CARRIER (PANAMA) S.A.,
YUAN-LIAN CHANG MARINE (PANAMA)
S.A., C.C. LINE HOLDING, LTD.
Defendants.

---

84 Civ 5537(JFK)

JUDGMENT

This action having been commenced by plaintiff Interpool Limited on August 3, 1984 by the filing of a Complaint, Defendants' Affidavit of Confession of Judgment, and Affidavit of Arthur L. Burns attesting to the performance of all prerequisites to the entry of judgment by confession as set forth in Defendant's Affidavit of Confession of Judgment, and this Court, upon due consideration, being satisfied that plaintiff is entitled to judgment and has performed all prerequisites to obtaining judgment by confession now therefore,

IT IS ORDERED, ADJUDED AND DECREED that judgment be entered in favor of plaintiff against, jointly and severally, CHAR CHING MARINE (H.K.) CO., LTD., CHAR HSING MARINE CO., LTD., E.C. YANG, CHAR AN MARINE (PANAMA) S.A., CHAR CHE MARINE (PANAMA) S.A., CHAR CHERNG MARINE (PANAMA) S.A., CHAR CHUN MARINE (PANAMA) S.A., CHAR NING MARINE (PANAMA) S.A., CHAR FUH MARINE (PANAMA) S.A., CHAR HANG MARINE (PANAMA) S.A., CHAR HO HANG MARINE (PANAMA) S.A., CHAR HOONG MARINE (PANAMA) S.A., CHAR HUI MARINE (PANAMA) S.A., CHAR JIN MARINE (PANAMA) S.A., CHAR LIAN MARINE (PANAMA) S.A., CHAR LO MARINE (PANAMA) S.A., CHAR LY MARINE (PANAMA) S.A., CHAR SUO MARINE (PANAMA) S.A., CHAR TAI MARINE (PANAMA) S.A., CHAR YEH MARINE (PANAMA) S.A., CHAR YEUNG MARINE (PANAMA) S.A., MULTI-CARRIER (PANAMA) S.A., YUAN-LIAN CHANG MARINE (PANAMA) S.A., C.C. LINE HOLDING, LTD., in the amount of $1,181,863.00 together with prejudgment interest at 11

per cent from July 13, 1984 and costs to be taxed.

Dated: New York, New York
August 13, 1984
4:45 p.m.

/s/ Shirley Wohl

David E. R. Woolley
Peter J. Crosby, IV
Lillick McHose & Charles
725 S. Figueroa Street, Suite 1200
Los Angeles, California 90017-2513
(213) 488-7100
Attorneys for Defendants
CC SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INTERPOOL, LIMITED,
Plaintiff,
vs.
CHAR CHING MARINE (H.K.) CO., LTD.,
CHAR HSING MARINE CO., LTD.,
E.C. YANG, CHAR AN MARINE (PANAMA) S.A.;
CHAR CHE MARINE (PANAMA) S.A.,
CHAR CHERNG MARINE (PANAMA) S.A.,
CHAR CHUN MARINE (PANAMA) S.A.,
CHAR NING MARINE (PANAMA) S.A.,
CHAR FUH MARINE (PANAMA) S.A.,
CHAR HANG MARINE (PANAMA) S.A.,
CHAR HO HANG MARINE (PANAMA) S.A.,
CHAR HOONG MARINE (PANAMA) S.A.,
CHAR HUI MARINE (PANAMA) S.A.,
CHAR JIN MARINE (PANAMA) S.A.,
CHAR LIAN MARINE (PANAMA) S.A.,
CHAR LO MARINE (PANAMA) S.A.,
CHAR LY MARINE, CHAR SUO MARINE
(PANAMA) S.A., CHAR TAI MARINE
(PANAMA) S.A., CHAR YEUNG MARINE
(PANAMA) S.A., MULTI-CARRIER (PANAMA)
S.A., YUAN-LIAN CHANG MARINE (PANAMA)

S.A., C.C. LINE HOLDING, LTD. and CHAR YIGH MARINE (PANAMA) S.A.,
Defendants.

Case No. CV 84-6333 JWC

DEFENDANT CHAR YIGH MARINE (PANAMA) S.A.'S ANSWERS TO JURISDICTIONAL INTERROGATORIES

INTRODUCTORY STATEMENT

Char Yigh answers the following interrogatories based upon a comprehensive review of its own records, of the records and recollections of its officers, and upon such materials as are in the hands of its attorneys (although nothing in this respect is intended as a waiver of the attorney-client privilege). The answers herein are composite, and are as true and correct as can possibly be made at this time with the materials and recollections which we have obtained.

* * *

[omitted Interrogatory No. 1]

Interrogatory No. 2

Please state each and every reason why you contend Sumitomo Bank has no control over Char Yigh.

Answer to Interrogatory No. 2

The Sumitomo Bank, Ltd. exercises no daily or general control over the activities of Char Yigh what-

soever. The Sumitomo Bank, Ltd. owns and owned no share in Char Yigh at any time, nor did it have common directors or officers at any time.

Char Yigh has been able to determine that The Sumitomo Bank, Ltd., provided *no* funds for the purchase of CC SAN FRANCISCO, and received *no* funds from the sale of CC SAN FRANCISCO.

Char Yigh Marine (Panama) S.A. was formed in Panama City, Panama on the 15th of October, 1982 for the purpose of shipowning. The company at that time was a wholly-owned subsidiary of C.C. Line Holding, Ltd., a company incorporated and registered in Hong Kong. At the time of formation, the directors of Char Yigh were Yang E. Chang, President/ Director, Chang Lian Deng, Treasure/Director, Tu Pai Ying, Secretary/ Director. None of these persons, and no part of Char Yigh, was controlled by The Sumitomo Bank, Ltd.

So far as it is known to the trustees of Char Yigh, in November, 1982, Char Yigh, as part of plans to create a regular liner service from the Far East to the West Coast of the United States, entered into a building contract with Sanoyasu Dockyard Co., Ltd. for the construction of Hull No. 1058, ultimately to be named CC SAN FRANCISCO, at a cost of ¥3,850,000,000.

The building contract provided for three payments each of ¥192,500,000 prior to delivery, and the balance of the price to be paid at delivery. By an addendum to the building contract, the contract price under the building contract was increased by ¥140,000,000 to a total ¥3,990,000,000.

Post-delivery financing was required, and this was sought through SB General Leasing (Hong Kong) Co., Ltd. The arrangements are recorded in a Share Purchase Agreement, dated December 16, 1982, to which was attached the draft bareboat charter agreement, under

which the vessel CC SAN FRANCISCO would be operated by Char Jin Marine (Panama) S.A. after delivery. Pursuant to the terms of the Share Purchase Agreement, on delivery of the vessel CC SAN FRANCISCO, the shares in Char Yigh would be sold to SB General Leasing (Hong Kong) Co., Ltd., and the then directors replaced. Such a financing method using a bareboat charter was and is in common use in Hong Kong and elsewhere.

During the period of construction, funds in the sum of ¥577,500,000 were indeed provided by C.C. Line Holding, Ltd., for and on behalf of its subsidiary, Char Yigh, representing the first three payments under the building contract with Sanoyasu Dockyard Co., Ltd. As far as the present trustees can determine, none of these funds came from The Sumitomo Bank, Ltd.

On November 4, 1983, shortly prior to the delivery of the vessel CC SAN FRANCISCO, the then directors and officers of Char Yigh resigned and were replaced by the following: Koji Uchida as Director/President, Takeshi Hiramine as Director/ Treasurer, and Esther Lin Chun Ngan as Director/Secretary.

The transfer of shares was effected by a resolution of the directors of C.C. Line Holding, Ltd., dated November 4, 1983, and a formal Instrument of Transfer dated November 8, 1983. No part of the funds used for the purchase of Char Yigh by SB General Leasing (Hong Kong) Co., Ltd., was provided by The Sumitomo Bank, Ltd.

On delivery of the vessel CC SAN FRANCISCO on November 7, 1983, the balance of the purchase price under the building contract was paid. Char Yigh obtained funds to pay the balance of the purchase price under a Loan Agreement dated November 7, 1983, with SB General Leasing (Hong Kong) Co., Ltd.

No Part of the funds required for the purchase of the vessel CC SAN FRANCISCO from Sanoyasu Dockyard Co., Ltd., were provided to Char Yigh or to its lender by The Sumitomo Bank, Ltd.

Pursuant to the terms of the said Loan Agreement, Char Yigh had undertaken to provide a mortgage to SB General Leasing (Hong Kong) Co., Ltd. Such a written mortgage was prepared between Char Yigh and SB General Leasing (Hong Kong) Co., Ltd., and filed on August 14, 1984 with the Panamanian authorities.

The agreement to grant a mortgage was not in any way directed or controlled by The Sumitomo Bank, Ltd., nor was the preparation, execution, and filing of the mortgage in August, 1984 in any way directed or controlled by The Sumitomo Bank, Ltd.

Upon delivery, CC SAN FRANCISCO was registered under the laws of Panama to the ownership of Char Yigh; Char Yigh entrusted the operation of the vessel to Char Jin pursuant to the bareboat charterparty. The payments of charterhire under this bareboat charter were intended to enable Char Yigh to repay its borrowings from SB General Leasing (Hong Kong) Co., Ltd.

The difference between the rate of interest charged to Char Yigh under its Loan Agreement with SB General Leasing (Hong Kong) Co., Ltd., and that charged by Char Yigh to Char Jin under the Bareboat Charterparty, was intended to enable Char Yigh to meet its own corporate and other operating costs. At no time were any of the sums forming part of this difference between interest rates actually passed, or intended to be passed, on to The Sumitomo Bank, Ltd., nor was the level of profit, or the decision to take a profit, directed or required by The Sumitomo Bank, Ltd.

At no time was title in the vessel CC SAN FRANCISCO ever held by The Sumitomo Bank, Ltd., nor was

it at any time intended to be transferred to The Sumitomo Bank, Ltd. There is no factual basis whatsoever for any allegation that any funds herein were provided by The Sumitomo Bank, Ltd., from its own assets. *The Sumitomo Bank, Ltd. was a complete stranger to the transaction here involved, having neither financial, equitable, nor reversionary interest in any part of this transaction.*

As is well known to this court, by August, 1984 C.C. Line became unable to pay its obligations. As part of this inability, Char Jin was unable to pay charterhire to Char Yigh. Char Yigh declared Char Jin in default under the charterparty, and withdrew the vessel by writings of August 14 and 24, 1984 Char Yigh was unable to pay its loan obligations and Char Yigh therefore fell into default with SB General Leasing (Hong Kong) Co., Ltd., under its mortgage. Notices of demand by SB General Leasing (Hong Kong) Co., Ltd., were made following default by Char Yigh by notices in writing dated August 17 and 27, 1984. These notices of default were neither prepared by nor pursuant to the instructions of the The Sumitomo Bank, Ltd., in any way whatsoever.

Shortly before the vessel came into Los Angeles in August, 1984, Char Yigh attempted to wrest daily control and operation of the vessel from C.C. Line, which was obviously then in a state of near collapse. The decision of Char Yigh to attempt to reassert control over its vessel was not dictated to it, suggested to it, or required of it by The Sumitomo Bank, Ltd. in any way whatsoever.

After the arrest of the vessel CC SAN FRANCISCO in Los Angeles in August, 1984, Char Yigh and its mortgagee SB General Leasing (Hong Kong) Co., Ltd. were required to advance funds for fuel, food, wages, and general operation of the vessel. No part of these funds were advanced in any way, by The Sumitomo

Bank, Ltd., nor did The Sumitomo Bank, Ltd. have any direction or control over the use of these funds.

During the life of the contract with Char Jin, none of the funds or operational expenses of Char Yigh were in any way paid for, advanced, controlled or directed by The Sumitomo Bank, Ltd.

When it was necessary to release the vessel CC SAN FRANCISCO from arrest and attachments, Char Yigh and the mortgagee, SB General Leasing (Hong Kong) Co., Ltd., needed to procure security acceptable to the Plaintiffs. Because of the need to obtain security quickly, they did not approach any bank other than The Sumitomo Bank, Ltd. (although they could have done so), since The Sumitomo Bank, Ltd. was prepared to act quickly on the request of SB General Leasing Co., Ltd. in Tokyo acting at the request of SB General Leasing (Hong Kong) Co., Ltd., without requiring counter-security. The Sumitomo Bank, Ltd. has charged, and continues to charge for each outstanding letter of undertaking, premiums calculated at commercial rates. Of course, liabilities under these letters do not arise until judgments are awarded in the underlying cases satisfactory to the terms of the letters. Nonetheless, fees on account of the undertakings are collected and are paid regularly to The Sumitomo Bank, Ltd. The Sumitomo Bank, Ltd. has no direction or control over any aspect of the underlying litigation whatsoever in any of the cases in which letters of undertaking have issued. The Sumitomo Bank, Ltd., at no time exercised, and presently exercises neither general nor specific control over the conduct of Char Yigh in the present case.

The letter of undertaking issued in the present action was rejected by Interpool, and a bond from a U.S. bonding company was substituted. The letter has been exonerated.

In Japan, the vessel was arrested in much the same kind of proceeding as occurred in the United States. The arrests in Japan were performed by Japanese material-men and were instituted by Yatomi Shokai Company, Ltd., and Pacific Ocean Co., Ltd. who were represented by the Iida Law Office of Akasaka, Tokyo. Char Yigh appeared in this action through the law offices of Tanabe Sogo of Marunouchi, Tokyo. SB General Leasing (Hong Kong) Co., Ltd., as mortgagee, with the most to lose in this matter, was represented by the law firm of Shinmyo, Shimoyamada, Asai & Yamamori of Nishi-Shimbashi, Tokyo. None of the actions of these parties was in any way dictated by, directed by, or controlled by The Sumitomo Bank, Ltd.

The vessel CC SAN FRANCISCO was judicially sold, for a very substantial amount of money, being ¥2,950,000,000, which we believe represents a fair approximation of the vessel's market value. No event relating to the sale of CC SAN FRANCISCO by court auction was dictated or controlled by The Sumitomo Bank, Ltd. The sale was conducted in accordance with all notice and procedural requirements of Japanese law, and funds changed hands. After the proceeds of sale were received by the court, it deducted court costs and prior claims, and there was left a balance of ¥2,925,606,562 for distribution. No part of this sum was paid to The Sumitomo Bank, Ltd., and The Sumitomo Bank, Ltd. exercised no discretion, direction, or control over any part of these funds, while in the Registry of the Court in Japan, or after disbursement.

Char Yigh operated in exactly the way one would expect of a solvent, subsidiary corporation. It kept an independent bank account in Yen with The Sumitomo Bank, Ltd. in Osaka, operated on the instructions of Mr. Uchida, prepared the necessary minutes, kept other corporate records necessary to the operation of a

bonafide corporation, and it commissioned financial statements from well-recognized auditors. After the demise of C.C. Line, and the sale of its vessel by judicial auction, it was clear that Char Yigh had no further sources of income. Consequently, pursuant to the laws of Panama, it filed for dissolution in March of 1985. The effect of dissolution is to alter the status of those members of the Board of Directors at the time of dissolution into trustees of the affairs of Char Yigh. Under Panamanian law, trustees have power to continue to deal with all matters pertinent to the winding up of the affairs of Char Yigh, including this litigation, for as long as is necessary after the institution of dissolution proceedings. The decision to dissolve was neither directed, dictated by, nor controlled by The Sumitomo Bank, Ltd., in any way whatsoever.

At no time prior to the institution of this action, or within the period of this action, has The Sumitomo Bank, Ltd., in any event, sought to dictate the activities of any member of the Board of Directors of Char Yigh, and it would have no right to do so. The Sumitomo Bank, Ltd. had and has no power to control the composition of any part of the Board of Directors of Char Yigh.

* * *

[omitted pages 11-13]

In conclusion, at no stage in its existence was Char Yigh in any way subject to the discretion, direction or control of The Sumitomo Bank, Ltd. In particular, The Sumitomo Bank, Ltd. provided no part of the funds loaned to Char Yigh for the purchase of CC SAN FRANCISCO. As a result, The Sumitomo Bank, Ltd. received no part of the funds disbursed by the Court in Japan pursuant to the decree of judicial sale.

DATED: April 24, 1986

DAVID E. R. WOOLLEY
PETER J. CROSBY, IV
LILLICK McHOSE & CHARLES

/s/ David E. R. Woolley
David E. R. Woolley
Attorneys for Defendants
CC SAN FRANCISCO and
CHAR YIGH MARINE
(PANAMA) S.A.

DECLARATION OF TAKESHI HIRAMINE

I, Takeshi Hiramine, a trustee of Char Yigh Marine (Panama) S.A., with office and residence in Hong Kong, sign these interrogatories on behalf of Char Yigh Marine (Panama) S.A. I declare under penalty of perjury under the laws of the State of California that the answers are true and correct to the best of my information and belief, which is based on a combination of personal knowledge, information from other present trustees and former directors of Char Yigh, from documents and records, maintained by Char Yigh, and from reports of interviews and investigations made on behalf of Char Yigh.

DATED: April 30, 1986

/s/ Takeshi Hiramine
Takeshi Hiramine

at _____

DAVID E. R. WOOLLEY, State Bar No. 58686
WILLIAMS WOOLLEY
COGSWELL NAKAZAWA & RUSSELL
200 Oceangate, Suite 700
Long Beach, California 90802
Telephone: (310) 495-6000

Attorneys for Involuntary Third-Party Claimant
CHAR YIGH MARINE (PANAMA) S.A.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INTERPOOL, LIMITED,
Plaintiff,
vs.
CHAR YIGH MARINE (PANAMA) S.A
Involuntary Third-Party
Claimant,
and
E. C. YANG, an individual, in default; and CHAR CHING MARINE (H.K.) CO., LTD.; CHAR HSING MARINE CO., LTD.; CHAR AN MARINE (PANAMA) S.A.; CHAR CHE MARINE (PANAMA) S.A.; CHAR CHERNG MARINE (PANAMA) S.A.; CHAR CHUN MARINE (PANAMA) S.A.; CHAR NING MARINE (PANAMA) S.A.; CHAR FUH MARINE (PANAMA) S.A.; CHAR HANG MARINE (PANAMA) S.A.; CHAR HO HANG MARINE (PANAMA) S.A.; CHAR HOONG MARINE (PANAMA) S.A.; CHAR HUI MARINE (PANAMA) S.A.; CHAR JIN MARINE (PANAMA) S.A.; CHAR LIAN MARINE (PANAMA) S.A.;

CHAR LO MARINE (PANAMA) S.A.; CHAR LY MARINE; CHAR SUO MARINE (PANAMA) CHAR TAI MARINE (PANAMA) S.A.; CHAR YEUNG MARINE (PANAMA) S.A.; MULTI CARRIER (PANAMA) S.A.; YUAN-LIAN CHANG MARINE (PANAMA) S.A.; C.C. LINE HOLDING, LTD., corporations in default;

Defendants.

CASE NO. CV-84-6333 IH

INVOLUNTARY THIRD-PARTY CLAIM OF CHAR YIGH MARINE (PANAMA) S.A. IN THE VESSEL C.C. SAN FRANCISCO, OR MORE PROPERLY, A CLAIM IN INTERVENTION AS OF RIGHT

(C.C.P. §§ 720.110, 720.210(b))

COMES NOW, CHAR YIGH MARINE (PANAMA) S.A. (hereinafter "CHAR YIGH") and involuntarily brings this Third-Party Claim of Ownership pursuant to California Code of Civil Procedure § 720.110 or, alternatively, a Third-Party Claim of Security Interest pursuant to California Code of Civil Procedure § 720.210 in the vessel C.C. SAN FRANCISCO, which plaintiff INTERPOOL has attempted to attach, and alleges:

FIRST CAUSE OF ACTION
(Third-Party Claim - Ownership)

1. Involuntary Third-Party Claimant CHAR YIGH at all relevant times prior to March 30, 1985 was a foreign corporation extant and existing under the laws of the Republic of Panama. CHAR YIGH, having been dissolved under the laws of the Republic of Panama, now acts through trustees with the intent of protecting and preserving the initial corporate assets, and of recovering damages and costs of defense from Interpool. Inasmuch as this proceeding was brought prior to the dissolution of CHAR YIGH and has been contested by CHAR YIGH during and within three years of its dissolution, no prescriptive period applies to the defense of this action, and CHAR YIGH possesses legal capacity to defend and to prosecute its interests. Subject to the affirmative defenses below that no service has been properly made, service by mail of all subsequent pleadings in this action may be made on Williams Woolley Cogswell Nakazawa & Russell, 200 Oceangate, Suite 700, Long Beach, California 90802-4333, attention David E. R. Woolley.

2. CHAR YIGH claims to have possessed a sole and complete ownership interest in the vessel C.C. SAN FRANCISCO at the time of its arrest in August of 1984, and which was a Panamanian flag 25,000 DWT Single Screw Diesel Driven Cargo Ship.

3. At the time of arrest, the estimated market value of CHAR YIGH's ownership interest in the vessel C.C. SAN FRANCISCO was less than the construction price, and was about 2.5 billion yen, as demonstrated by a Japanese judicial sale in December 1984.

4. CHAR YIGH as buyer contracted for the construction and purchase of the vessel C.C. SAN FRANCISCO pursuant to a Contract For Construction And Sale dated November 1, 1982 with Sanoyosu Dockyard Company

Limited, the builder. After payment and delivery of the vessel, pursuant to the terms of the Contract, CHAR YIGH acquired sole legal and beneficial ownership of the vessel on November 8, 1983. Such ownership was evidenced by: (1) the Panamanian Certificate of Ownership issued on January 5, 1984, naming CHAR YIGH as the shipowner; (2) the Permanent Registration of Navigation issued on January 10, 1984, naming CHAR YIGH as owner of the vessel; and (3) Panama Public Deed No. 18270 dated December 9, 1983, which pertained to Property Title as protocolized, and which was duly annotated as to registration. Each of these documents are formal documents registered and issued for public purposes under the laws of the Republic of Panama and are not subject to collateral attack or judicial disregard in this Court. Each of the documents in this claim has previously been produced in this litigation and therefore are not appended hereto, but are available at Claimant's counsel's offices and will be produced upon request.

5. Pursuant to a Bareboat Charter Agreement dated November 4, 1983 (hereinafter "Charter") made between CHAR YIGH (as owner) and Char Jin Marine (PANAMA) S.A. (hereinafter "Char Jin") (as charterer), CHAR YIGH agreed to "let and demise" the vessel for a term of 10 years to Char Jin. Article 23 of the Charter stipulates that the Charter is to be governed by and construed in accordance with the laws of Hong Kong, and under these laws, creates no present ownership interest in Char Jin incompatible with CHAR YIGH's right, title and interest.

6. Prior to the institution of this action, Char Jin failed to pay any installment of principal demise charter party hire so that CHAR YIGH declared Char Jin in default and withdrew the vessel from party hire on August 14, 1984. This withdrawal was effective under

the laws of Hong Kong. After August 14, 1984, therefore, Char Jin and its creditors deprived themselves of all residual or contingent rights whatsoever under the demise charter party in the C.C. SAN FRANCISCO or its proceeds.

7. CHAR YIGH contended at the time of the arrest, has contended throughout the entire period in which INTERPOOL has attempted to attach the C.C. SAN FRANCISCO, and continues to contend, that at no time relevant did Char Jin or any C.C. Line company have any attachable interest in the vessel C.C SAN FRANCISCO.

8. INTERPOOL cannot attach the vessel C.C. SAN FRANCISCO to secure any future judgment against Char Jin or C.C. Line company, as none of these defendants had an attachable interest in the vessel.

9. INTERPOOL cannot attach the vessel C.C. SAN FRANCISCO to secure any future judgment against Char Jin or any C.C. Line company, as CHAR YIGH, and not these defendants, has an ownership interest in the C.C. SAN FRANCISCO.

SECOND CAUSE OF ACTION

(Third-Party Claim - Security Interest)

10. Involuntary Third-Party Claimant CHAR YIGH hereby incorporates paragraphs 1 through 9 of this involuntary third-party claim by reference.

11. The Ninth Circuit has held that the charter between CHAR YIGH and Char Jin was a "security instrument," rather than a true lease. *INTERPOOL Ltd. v. CHAR YIGH Marine (Panama) S.A.*, 890 F.2d 1453, 1460 (9th Cir. 1989). According to the Ninth Circuit, therefore, CHAR YIGH's interest in the C.C. SAN FRANCISCO is a "security interest."

12. CHAR YIGH perfected what the Ninth Circuit has called its "security interest" by taking each of the following actions, independently and in concert:

a. Obtaining the Panamanian Certificate of Ownership the Permanent Registration of Navigation and recording Panama's Public Deed No. 18L70, all no later than January 10, 1984.

b. Revoking the charterparty agreement on August 14, 1984.

c. By taking possession of C.C. SAN FRANCISCO on or about September 7, 1984.

13. INTERPOOL has never obtained a writ of attachment and, consequently, has no present interest in the C.C. SAN FRANCISCO.

14. Even if INTERPOOL should obtain a writ of attachment and, subsequently, obtain a judgment, CHAR YIGH's perfected "security interest" in the C.C. SAN FRANCISCO will still take priority over INTERPOOL's lien.

15. CHAR YIGH's security interest takes priority over any present or future interest that INTERPOOL may obtain against the C.C. SAN FRANCISCO; therefore, INTERPOOL is not entitled to execute against the C.C. SAN FRANCISCO, or the security which stands in lieu of the vessel, until CHAR YIGH's perfected security interest has been satisfied.

16. CHAR YIGH estimates that the total amount due or to accrue under its security interest was 4.1 billion yen.

17. The applicable rate of interest on the amounts due was 4.9% at the relevant times.

FIRST AFFIRMATIVE DEFENSE

18. CHAR YIGH appears involuntarily under this Court's order as a third-party claimant in this proceeding. On November 25, 1991, this Court ruled that no cause of action existed against CHAR YIGH, and ordered its dismissal with prejudice. The Court then instructed CHAR YIGH to accept third-party claimant status so that it may protect its security interest in the C.C. SAN FRANCISCO and its interest in the security bond that it posted for the release of the C.C. SAN FRANCISCO.

19. By appearing involuntarily as a "third-party claimant" in this proceeding, CHAR YIGH does not waive any claims, rights or defenses that it has previously asserted or may assert.

SECOND AFFIRMATIVE DEFENSE

20. It is procedurally premature for CHAR YIGH to appear as a third-party claimant because the prerequisites for its appearance have not been satisfied.

21. California Code of Civil Procedure § 720.120(a) provides:

> Where personal property has been levied upon under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ of possession, or a writ of sale, a third person claiming security interest in or a lien on the personal property may make a third-party claim under this chapter if the security interest or lien is superior to the creditor's lien on the property.

22. No writ of attachment has issued in this proceeding; therefore, CHAR YIGH may not appear as a third-party claimant until this important prerequisite for an appearance has been met.

THIRD AFFIRMATIVE DEFENSE

23. CHAR YIGH makes a limited appearance in this proceeding, just as it had as a defendant earlier in the proceeding, and only for the purpose ordered by the Court, inasmuch as this Court lacks jurisdiction for want of service of summons and complaint on CHAR YIGH as defendant, or summons and complaint and supporting papers on CHAR YIGH as a third-party claimant under California Code of Civil Procedure § 484.040.

FOURTH AFFIRMATIVE DEFENSE

24. INTERPOOL failed at the outset of this proceeding to provide adequate legal notice of this proceeding to CHAR YIGH as is required under California Code of Civil Procedure § 484.040 and so there is a lack of jurisdiction over CHAR YIGH and its bond.

FIFTH AFFIRMATIVE DEFENSE

25. Inasmuch as the issuance of a writ of attachment is a statutory condition precedent to a third-party claim under California Code of Civil Procedure § 720.010, *et seq.*, and this condition precedent has not been satisfied, CHAR YIGH contends it is, and should be treated as a claimant-in-intervention as of right under F.R.Civ.P. Rule 24(a).

SIXTH AFFIRMATIVE DEFENSE

26. The Court lacks jurisdiction in this proceeding because the Court did not have *in rem* jurisdiction over the C.C. SAN FRANCISCO at the time of the *in rem* arrest as required by Federal Rule of Civil Procedure Supplemental Rule C(2); because INTERPOOL failed to serve CHAR YIGH *in personam* as required by California Code of Civil Procedure § 484.040; and because CHAR YIGH has never made a *voluntary* appearance in this proceeding.

SEVENTH AFFIRMATIVE DEFENSE

27. The Court has no constitutional basis for exercising jurisdiction in this proceeding because CHAR YIGH has not received adequate legal notice of this proceeding as is required under California Code of Civil Procedure § 484.040.

EIGHTH AFFIRMATIVE DEFENSE

28. As this proceeding involves a dispute between INTERPOOL, a Bahamian corporation, against C.C. Line, a Taiwanese corporation, Char Jin, a Hong Kong corporation, and CHAR YIGH, a Panamanian corporation concerning Panamanian and Hong Kong law, and as the United States has no interest in the outcome of this dispute, the Court should exercise its "unfettered discretion" in admiralty and must therefore dismiss this proceeding under the doctrine of *forum non conveniens*, to Panama.

NINTH AFFIRMATIVE DEFENSE

29. Under federal maritime choice-of-law rules, the Court may not disregard the federal maritime law of the flag as controlling the issue of ownership in this proceeding and must, therefore, recognize that CHAR YIGH is the owner of the C.C. SAN FRANCISCO.

TENTH AFFIRMATIVE DEFENSE

30. Under Act of State Doctrine as illustrated in *Underhill v. Hernandez*, 168 U.S. 250, 42 L.Ed. 456 (1897) and applied in *Bernstein v. Van Heyghen Freres, S.A.*, 163 F.3d 246 (2d Cir. 1947), the Court may not disregard CHAR YIGH's corporate status to divest it of ownership of its property.

ELEVENTH AFFIRMATIVE DEFENSE

31. The security herein has expired by operation of law.

TWELFTH AFFIRMATIVE DEFENSE

32. Plaintiff's cause of action against the defendants was wholly subsumed by the S.D.N.Y. judgment.

THIRTEENTH AFFIRMATIVE DEFENSE

33. To the extent the burden of proof is placed on third-party claimant, this is an unconstitutional burden.

WHEREFORE, CHAR YIGH demands that its ownership interest or, alternatively, its superior security interest be given priority over any interest, if any, that INTERPOOL may have or acquire in the vessel C.C. SAN FRANCISCO as a consequence of this attachment proceeding.

Dated: January 10, 1992

WILLIAMS WOOLLEY
COGSWELL NAKAZAWA & RUSSELL

By: _____
David E. R. Woolley
Attorneys for Involuntary
Third-Party Claimant
CHAR YIGH MARINE
(PANAMA) S.A.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
JAN 17 1992
Clerk, U.S. District Court
Central District of California

INTERPOOL LIMITED,
Plaintiff,
v.
CHAR CHING MARINE (H.K.)
CO., LTD., et al.,
Defendants.

NO. CV84-6333-IH

SUMMARY JUDGMENT FOR PLAINTIFF

There came before the Court for hearing on January 13, 1992, plaintiff's motion for summary judgment filed December 6, 1991. Appearances were: For plaintiff, Fisher & Porter by David S. Porter, Esq. and Joseph P. Tabrisky, Esq. David E. R. Woolley, Esq. of Williams Woolley Cogswell Nakazawa & Russell appeared on behalf of Char Yigh Marine (Panama) S.A. (hereinafter "Char Ying").

The Court having considered the said motion together with the points and authorities and other documents filed in support thereof and having considered other documents in the file related to said motion, and having heard counsel, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. There is no bona fide dispute of material fact which precludes summary judgment for plaintiff as prayed. Plaintiff has shown entitlement to summary judgment as a matter of law.

2. The Court grants summary judgment to plaintiff on two separate and alternative bases. First, the Court finds that Char Yigh, originally a defendant in the action and by order of the Court later appearing as a third party claimant, has no standing or capacity to continue defense or prosecution of the action in any capacity. Thus its purported opposition to the summary judgment motion is stricken and the motion will be granted for lack of opposition pursuant to Local Rule 7.9.

Secondly, assuming that Char Yigh's purported opposition is properly before the Court and that Char Yigh has capacity and standing to oppose the motion, the Court has considered the said opposition, and finds the motion grantable on the merits.

3. A transcript of the proceedings in open court on January 13, 1992, is ordered filed when produced. It is incorporated herein by reference. The transcript shall constitute the Court's further findings of fact and conclusions of law as well as a statement of the Court's reasons.

4. Pursuant to the above stated grant of plaintiff's motion, IT IS FURTHER ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

A. For the purposes of establishing the extent of the attachable interest pursuant to the existing bond, plaintiff's lien creditor attachment interest in the C.C. San Francisco must be treated as a valid lien which is prior in right to Char Yigh's unperfected security interest, which is in the form of the bareboat charter agreement.

B. Plaintiff is entitled to satisfaction of its contract claims against C.C. Line from the value of the vessel prior to Char Yigh's unperfected security interest. *See* California Commercial Code Section 9301(1)(b).

C. Plaintiff Interpool Limited shall have judgment against Char Yigh Marine (Panama) S.A. in the sum of $1,000,000 plus proportionate administrative expenses as previously stipulated of $22,500, a total judgment of $1,022,500, with costs of $ _____.

4. The Clerk shall transmit a copy of this judgment by U.S. mail to counsel for plaintiff and to counsel for Char Yigh.

DATED: January 17, 1992.

/s/ IRVING HILL
IRVING HILL, Judge
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
APR 15 1994
Clerk, U.S. District Court
Central District of California

CRESCENT WHARF AND WAREHOUSE CO., a California corporation dba STEVEDORING SERVICES OF AMERICA, INC. and STEVEDORING SERVICES OF AMERICA, INC., a California corporation,
Plaintiffs,
v.
The Vessel C.C. SAN FRANCISCO, her engines, tackle, apparel, furniture and fixtures *in rem*, and CHAR YIGH MARINE (Panama) S.A., *in personam*,
Defendants.

CV 84-6287 KN

ORDER Re Motion for Reconsideration etc.

This constitutes notice of entry as required by FRCP, Rule 77(d).

The Court has considered Claimant's motion for reconsideration and/or a new trial. The Court DENIES the motion for a new trial and rules as follows with respect to the motion for reconsideration.[1]

Lack of capacity to sue must be raised "by specific negative averment," Fed.R.Civ.P. 9(a). Unless lack of capacity "is raised in an appropriate pleading or amendment," it is waived. *Wagner Furniture v. Kemner's Georgetown Manor*, 929 F.2d 343, 345-346 (7th Cir. 1991) (citing, among other cases, *Summers v. Interstate Tractor and Equipment Co.*, 466 F.2d 42, 49 (9th Cir. 1972)). *Accord In Re Allustiarte*, 786 F.2d 910, 914 (9th Cir. 1986).

Here, Plaintiffs raised the issue of lack of capacity by bringing a motion in limine at the eleventh hour. The issue was not contained in the Pre-Trial Conference Order which supersedes the pleadings. Neither Plaintiffs' timing nor Plaintiffs' vehicle is appropriate under Rule 9(a) and the above-cited case law. For these reasons the Court agrees with Claimant that lack of capacity based on the dissolution of Char Yigh in 1985 was not properly raised by Plaintiffs. The Court therefore **STRIKES** Conclusions of Law 12 and 13.[2]

---

[1] The Court rules without the benefit of oral argument despite Claimant's request therefor.

[2] Although Claimant also requests that the Court strike Conclusions of Law 14 and 15, these Conclusions address different issues, and will not be stricken. Nor is it appropriate or necessary to strike Finding of Fact 24, which merely states the uncontroverted fact that Char Yigh was dissolved in 1985. The argument, of course, is the legal effect of the 1985 dissolution under Panamanian law. On this point the parties have submitted conflicting interpretations from Panamanian counsel. Because Plaintiffs had the burden of proof on their motion in limine, even if the Court had decided that the issue of capacity was properly raised therein, Plaintiffs would not have prevailed as the evidence proffered did not adequately support their position.

[Text omitted.]

IT IS SO ORDERED.

DATED: April 13, 1994

/s/ DAVID V. KENYON
DAVID V. KENYON
United States District Judge

NINTH CIRCUIT LOCAL RULE

CIRCUIT RULE 36-3. OTHER DISPOSITIONS

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

Effective July 1, 1994.

(2)

No. 94-2103

Supreme Court, U.S.
FILED
JUL 7 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

In Re CHAR YIGH MARINE (PANAMA) S.A.,

Petitioner.

Petition For Writ Of Mandamus/Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

DAVID S. PORTER
Counsel of Record
FISHER & PORTER
A Law Corporation
110 Pine Avenue, 11th Floor
Long Beach, California 90802
(310) 435-5626

Attorneys for Respondent Interpool Limited

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

36 pp

QUESTION PRESENTED

Respondent is dissatisfied with the Question Presented by Petitioner. The Question Presented should be as follows:

May Petitioner seek an extraordinary writ from, or alternatively review by, this Court on an issue which was not "pressed or passed upon" in the Ninth Circuit Court of Appeals?

PARTIES TO THE PROCEEDING

Respondent is dissatisfied with the Parties to the Proceeding set forth by Petitioner. The following parties, including parent and/or subsidiary companies under Supreme Court Rule 29.1, have interests in this action:

Interpool Limited

Allianz of America, Inc.:
Fireman's Fund Insurance Company

Royal Group, Inc.:
Royal Insurance Company

Atlas Assurance Company of America:
Albany Insurance Company

St. Paul Companies, Inc.:
St. Paul Fire & Marine Insurance Company

Lumbermen's Mutual Casualty Co.:
American Motorist Insurance Co.

Federal Insurance Company:
Sun Insurance Co. of New York

Nationwide Mutual Insurance Company:
Employers Insurance of Wausau

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATUTES 1

I. STATEMENT OF THE CASE 1

II. SUMMARY OF ARGUMENT 4

III. THERE ARE NO PROPER GROUNDS FOR MANDAMUS OR REVIEW 5

IV. THERE IS NO EVIDENCE TO SUPPORT PETITIONER'S THEORY OF A SUBSTITUTE TRUSTEESHIP 7

V. PETITIONER'S MISSTATEMENTS OF FACT AND LW 11

VI. CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 621, 69 S.Ct. 762, 93 L.Ed. 931 (1949) 9

Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., 808 F.2d 697 (9th Cir. 1987), *cert. denied sub nom., Intel Containers International Corp. v. M/V C.C. SAN FRANCISCO*, 484 U.S. 828, 108 S.Ct. 96, 98 L.Ed.2d 58 (1987) 1, 2

Interpool Ltd. v. Char Yigh Marine (Panama) S.A., 890 F.2d 1453 (9th Cir. 1989), *modified*, 918 F.2d 1476 (9th Cir. 1990) 1, 2, 3, 12

State of California v. Taylor, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957) 7

United States ex rel. Acme Granite & Tile Co. v. F.D. Rich Co., 437 F.2d 549 (9th Cir. 1970), *rehearing den.* 441 F.2d 1143 (9th Cir. 1971), *cert. den.*, 404 U.S. 823 (1971) 10

United States v. Williams, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) 6

OTHER AUTHORITIES

Fed. R. Civ. Pro. § 17(b) 1, 11

Fed. R. Civ. Pro. § 25(c) ..... *passim*

Local Rules of the Central District of California, Rule 7.3.3 ..... 1, 8

Supreme Court Rule 10 5

Supreme Court Rule 15.1 11

Supreme Court Rule 20.1 6

STATUTES

The following statutes and rules are relied upon herein by Respondent, and are set forth in full in Appendix 1:

Fed. R. Civ. Pro. § 25(c)

Fed. R. Civ. Pro. § 17(b)

Local Rules of the Central District of California, § 7.3.3

I. STATEMENT OF THE CASE

Respondent Interpool Limited brought suit against a series of interwoven foreign shipping companies operating collectively as "C.C. Line." The suit alleged a series of breaches of shipping container (and related equipment) lease agreements, and sought millions of dollars in damages. *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*, 890 F.2d 1453 (9th Cir. 1989), *modified*, 918 F.2d 1476 (9th Cir. 1990). Other creditors followed with similar actions. *See, Foss Launch & Tug Co. v. Char Ching Shipping U.S.A.*, 808 F.2d 697 (9th Cir. 1987), *cert. denied sub nom., Itel Containers International Corp. v. M/V C.C. SAN FRANCISCO*, 484 U.S. 828, 108 S.Ct. 96, 98 L.Ed.2d 58 (1987).

Faced with these suits and other creditor claims, C.C. Line then for all intents and purposes vanished, taking with it any remaining assets, never to appear in this or any other creditor actions. It left behind a bevy of creditors in the United States seeking to find and seize any remaining assets of C.C. Line to salvage something from their multi-million dollar losses.

C.C. Line's one known asset was a container ship, the C.C. SAN FRANCISCO, which was on its way to the Port of Long Beach. Upon arrival, the vessel became the subject of a vicious scramble among C.C. Line's creditors, including Respondent. The vessel variously was arrested and attached in the creditor actions. *Interpool*, 890 F.2d at 1455; *Foss Launch & Tug*, 808 F.2d at 698.

Another C.C. Line creditor which was scrambling for the C.C. SAN FRANCISCO was the ship financing lender, Petitioner Char Yigh Marine (Panama) S.A., a corporation organized and formed under the laws of Panama by a Hong Kong ship financing concern, SB General Leasing (Hong Kong) Co., Ltd. In order to deprive the other creditors, including Respondent, of any claims to the vessel, and to seize possession of the asset and whisk it away to the Orient before a creditor feeding frenzy could take place, Petitioner appeared in the district court and represented that it was the *owner* of the vessel, and not merely a creditor. Petitioner therefore asserted that it was entitled to immediate and unfettered possession of the vessel, and that no other creditors could assert claims against the vessel as an asset of C.C. Line. *Interpool*, 890 F.2d at 1456. As the court of appeals subsequently held, Petitioner's ownership claim was wrong; indeed, as Respondent had contended, the vessel was an asset of C.C. Line which was subject to attachment. *Interpool*, 890 F.2d at 1460-61.

But that was only the beginning of the complications in this case, for well before that appeal the vessel had been released to Petitioner by order of the district court. Petitioner had removed the vessel to Japan and sold it. Petitioner thereafter had dissolved as a corporation in

1986, leaving no apparent assets. *Interpool*, 890 F.2d at 1456-57. Thus, even though Petitioner was not the owner of the vessel, it succeeded in spiriting the vessel away from the district court and depriving creditors of C.C. Line, including Respondent, of the right to salvage any of their losses from the last remaining C.C. Line asset.

The one marginally saving grace is that the district court initially ordered Petitioner to post a $1 million bond in favor of Respondent in order to secure the release of the vessel. The bond stipulated that it would cover up to $1 million, plus interest and costs, of any *in personam* judgment Respondent could obtain against the C.C. Line entities, provided Respondent subsequently could establish that the C.C. Line entities had an attachable interest in the vessel. *Interpool*, 890 F.2d at 1456.[1]

Once the court of appeals decided in 1989 that the vessel indeed was a C.C. Line asset, and thus was subject to attachment for claims against C.C. Line, the case was remanded for "full consideration of whether Interpool possesses such a right [to attach the vessel.]" *Interpool*, 890 F.2d at 1461. Upon remand, the district court heard a series of motions, the ultimate findings of which showed that Respondent had established a right to attach the vessel, had met the conditions for recovery under the bond, and was entitled to a judgment against Petitioner under the terms of the bond stipulation in the sum of $1 million plus costs. Prejudgment interest was denied.

---

[1] The bond alternatively covered any *in rem* liability of the vessel. That liability is not at issue in this case.

The court of appeals subsequently affirmed the underlying judgment, but remanded on the interest issue, finding that prejudgment interest normally is awarded as a matter of course in cases such as this. Petitioner then filed two motions for reconsideration with the court of appeals. It was not until Petitioner's first motion for reconsideration that it raised any Fed. R. Civ. Pro. § 25(c) issue in this 11-year-old case, which issue now forms the basis for its Petition. In a Memorandum[2], which is the subject of this Petition, the court of appeals deemed the issue waived and rejected consideration of the merits of the argument. (Memorandum filed March 8, 1995, Appendix A to Petition.)

II. SUMMARY OF ARGUMENT

Petitioner seeks mandamus relief or review by this Court based on the issue of the application of Fed. R. Civ. Pro. § 25(c) to the facts of this case.[3] The issue was raised by Petitioner for the first time in this case in a motion for

---

[2] Under Circuit Rule 36-1, a written, reasoned disposition of a case which is not intended for publication is a "MEMORANDUM."

[3] The Petition states the "QUESTION PRESENTED" as follows:

> May the Ninth Circuit Court of Appeals ignore Federal Rule of Civil Procedure 25(c), its own published precedent on that Rule, and its own published 1990 decision in the present case, and sustain a 1992 District Court judgment of $1 million against Char Yigh Marine (Panama) S.A. on the grounds that Char Yigh lacks capacity to protect itself by reason of a corporate dissolution during litigation?

reconsideration filed with the court of appeals after the court already had affirmed the underlying judgment against Petitioner. The court of appeals, in reviewing the matters raised in the motion for reconsideration, noted that the Rule 25(c) argument had not been raised previously in the case or on appeal, and expressly held that the issue was waived:

> Char Yigh's failure in its earlier submissions to predicate an argument, or to file a motion based on Fed. R. Civ. Pro. § 25(c) constitutes a waiver of any such claim.

(Petitioner's Appendix A, p. A4, n. 2.)

Since the issue raised in this Petition was not "pressed or passed upon" in the court of appeals, and instead was deemed waived, the well-established precedent is that this Court will not recognize the issue.[4] Mandamus relief and/or certiorari therefore should be denied on the question presented in the Petition.

III. THERE ARE NO PROPER GROUNDS FOR MANDAMUS OR REVIEW

This case is not appropriate for review by this Court. First, the question presented was not "pressed or passed upon" by the court of appeals. Second, the question presented does not meet any of the criteria for review under the considerations stated in Supreme Court Rule 10.

---

[4] The only issue which was "pressed or passed upon" by the Court of Appeals with respect to Rule 25(c) was whether Petitioner's argument was properly deemed waived, a question which Petitioner has not presented here.

There are no conflicts of Circuit or Supreme Court authority, and no important questions of federal law which have not been settled by this Court.

There furthermore are no grounds for a writ of mandamus to issue under Supreme Court Rule 20.1. There is nothing in the Petition which shows that a writ will aid this Court's appellate jurisdiction in this case, that there are any exceptional circumstances warranting the exercise of this Court's discretionary powers, or that adequate relief cannot be obtained in any other form or from any other court. Indeed, the very fact that Petitioner seeks an alternative writ of certiorari to address the issues raised in its mandamus request demonstrates that an alternative to a writ of mandamus exists. Thus, the mandamus petition should be dismissed summarily.

As noted in Part II above, Petitioner's Fed. R. Civ. Pro. § 25(c) argument, which is the exclusive issue presented in its alternative petition for certiorari, was raised for the first time in this 11-year-old case in Petitioner's motion for reconsideration filed with the court of appeals. The court of appeals rejected the argument as untimely, and expressly held that the issue was waived. (Petitioner's Appendix A, p. A4, n. 2.)

The traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 40, 112 S.Ct. 1735, 1738, 118 L.Ed.2d 352 (1992). It is difficult to fathom how Petitioner can now ask this Court to issue a writ of mandamus or to review an issue which was never properly or timely raised in the Court below, and which was therefore not considered because it was deemed

waived by the court of appeals. *State of California v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957).

In this case, the issue of the application of Fed. R. Civ. Pro. § 25(c) was waived, and therefore was neither pressed nor passed upon by the court of appeals. Therefore, the issue should not be recognized by this Court, and review should be denied.

IV. THERE IS NO EVIDENCE TO SUPPORT PETITIONER'S THEORY OF A SUBSTITUTE TRUSTEESHIP

Substantively, there is no evidence in the record against which a Rule 25(c) analysis could be applied. Counsel for Petitioner conceded at the November 22, 1991 hearing on this matter in the district court that Petitioner was a dissolved Panamanian corporation, and that Panamanian law only allows for the continuance of defense of a dissolved corporation for a period of *three years*. Counsel further conceded that Petitioner's right to continue its defense expired in 1989. (See, Appendix 2 hereto, Transcript of November 22, 1991 Hearing, p. 23, l. 7 – p. 24, l. 11, CR 249.) Notwithstanding that under Panamanian law Petitioner no longer had a right to defend this action, counsel for Petitioner urged at the November 22, 1991 hearing that unidentified and undisclosed "trustees" had the right to continue with this action. (Appendix 2, Transcript of November 22, 1991 Hearing, p. 24 l. 10 – p. 25, l. 4.) Counsel provided no factual or legal basis for such a substitute corporate trusteeship, and no authority for the proposition that any such alleged "trustees" could

continue to represent Petitioner's purported interests in this litigation. The district court therefore questioned Petitioner's right to be represented in the litigation. (Appendix 2, transcript of November 22, 1991 Hearing, p. 25, ll. 5-13.) Petitioner then requested "two weeks to consider what position has to be made" with respect to the issue of whether the trustees would or could appear in this action to represent Petitioner. (Appendix 2, Transcript of November 22, 1991 Hearing, p. 24, l. 21 – p. 25, l. 4.)

Petitioner failed to comply with the district court's order to produce the requested authority and evidence within two weeks, and therefore was held to have no legal capacity since the record established it lacked any capacity to proceed. (See, Appendix 3 hereto, Transcript of January 13, 1992 Proceedings, p. 9, l. 7 – p. 17, l. 3, CR 274.) The district court rightfully refused to accept evidence which was proffered for the first time at the motion hearing, when the original submission date for such evidence had long passed. Local Rules of the Central District of California, Rule 7.3.3.[5]

Based on the evidentiary and legal record, as well as Petitioner's admissions, Petitioner ceased to have any ability under Panamanian law to prosecute or defend this action after 1989. It follows that without legal capacity, Petitioner could not further defend the underlying action and cannot now prosecute this Petition.

---

[5] Petitioner did not appeal the District Court's striking of late filed evidence, and any such attempted submissions are not part of the record.

Fed. R. Civ. Pro. § 25(c) provides:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

The record is devoid in this case of any evidence or authority that any actual, lawful transfer of interest from Petitioner to "trustees" or anyone else actually took place. That alone precludes any further consideration of a Rule 25(c) transfer of interest in this case.

It is true that "a time-honored feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a *statute* so providing." *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 621, 634-35, 69 S.Ct. 762, 93 L.Ed. 931 (1949) [Emphasis added.]

Putting aside the facts that the issue was not "pressed or passed upon" in the court of appeals and that the record is devoid of any evidence of an actual transfer of interest, the initial element lacking in this case for the application of Rule 25(c) is the absence of any evidence of *statutory* authority that would enable Petitioner to prosecute or defend this action beyond three years after Petitioner's dissolution. In this case, as noted above, counsel for Petitioner represented that Panamanian law provides that a dissolved Panamanian corporation may continue to prosecute and defend actions for a period of three years after dissolution. There is no evidence in the record that

this three-year period may be extended under Panamanian law, or that "trustees" may be substituted in place of the dissolved corporation at the end of the three year period. Thus, under the applicable Panamanian statutory grant of authority, Petitioner could not continue to prosecute or defend any aspect of this case at the expiration of the three year period. Absent a statutory grant of authority to continue or to transfer an interest to unnamed and undisclosed "trustees," Rule 25(c) has no application.

It is telling that even Petitioner's identification of the Parties to the Proceedings contained in its Petition only includes Petitioner Char Yigh Marine (Panama) S.A. ("Char Yigh") and SB General Leasing (Hong Kong) Co., Ltd. Nothing is mentioned about any purported "trustees" of or successors to Char Yigh. Without any timely appearance by a named successor to Petitioner, cases such as *United States ex rel. Acme Granite & Tile Co. v. F.D. Rich Co.*, 437 F.2d 549, 552 (9th Cir. 1970), *rehearing den.* 441 F.2d 1143 (9th Cir. 1971), *cert. den.*, 404 U.S. 823 (1971), have no application.[6]

---

[6] Petitioner grossly mischaracterizes the facts and holding in *Acme Granite*. The case does *not* stand for the proposition that "a dissolved defendant should always be allowed to substitute in its successor, if at all feasible." Petition, p. 19. To the contrary, the court of appeals held that substitution under Rule 25(c) was within the discretionary powers of the court. However, under the peculiar facts of the case, where the corporate dissolution was inadvertent and shareholders of the dissolved corporation sought timely relief to substitute in as parties, the Court of Appeals reluctantly concluded that denial of the substitution was an abuse of discretion on the part of the District Court. 427 F.2d at 552. Here, the dissolution was not inadvertent, there were no identified "trustees" or other parties who timely sought

In all events, Fed. R. Civ. Pro. § 25(c) does not apply to this case. Since Petitioner attempted to file its "Involuntary Third-Party Claim" (Appendix E to Petition) on January 10, 1992, which claim purportedly would have given Petitioner capacity to challenge Respondent's rights under the bond, that proceeding would have been filed long after the three-year expiration of corporate authority under Panamanian law. Thus, since the attempted "Involuntary Third-Party Claim" effectively would have been a new proceeding, Fed. R. Civ. Pro. § 17(b), and not § 25(c), would have applied to Petitioner's challenge to the bond recovery.

V. PETITIONER'S MISSTATEMENTS OF FACT AND LAW

Pursuant to Supreme Court Rule 15.1, and in addition to those items addressed above, Respondent wishes to point out the following material misstatements of fact and law contained in Petitioner's brief:

1. The $1 million bond security which was posted on behalf of Petitioner was to stand in the place and stead of the vessel "C.C. SAN FRANCISCO." Respondent claimed the vessel was an attachable asset of defendant

---

to be substituted, and there is no evidence in the record that Panamanian law would allow such a substitution or continuation of a defense beyond three years. There simply are no grounds for concluding that the district court abused any discretion, or that the court of appeals wrongly affirmed the district court's actions.

C.C. Line. Petitioner denied this point, and obtained custody of the vessel from the district court based on Petitioner's ownership representations with respect to the vessel. Petitioner was required to post the $1 million bond to secure Respondent in the event the vessel subsequently was held to be an attachable asset of C.C. Line. Respondent's position with respect to ownership and attachment ultimately were validated by the court of appeals in *Interpool*, 890 F.2d 1453. Thus, the judgment for $1 million in this case against Petitioner was based not on any direct liability to Respondent, but instead was based on the fact that Petitioner had taken custody of a vessel from the district court which should have been available to Respondent as an attachable asset of Respondent's debtor, C.C. Line. In the absence of the vessel to satisfy Respondent's claim, judgment was rendered based on the bond security which had been posted by Petitioner to secure the release of a vessel. Any references by Petitioner to a judgment being entered against it as a dismissed party wrongly implies that a judgment was rendered against a party over which the district court had no jurisdiction. This is not true; jurisdiction for the judgment against Petitioner existed because it voluntarily appeared in the action and obtained custody of the vessel under an ownership claim, and because of the terms of the stipulated security which granted custody of the vessel to Petitioner.

2. Petitioner dissolved in 1986. At the time the appeal in *Interpool v. Char Yigh* was pending in the court of appeals, the three-year period for Petitioner to continue litigation had not expired. Therefore, the court of appeals' reference to Petitioner's capacity was a correct

statement of law at the relevant time. This did not mean, however, that the statutory three-year period under Panamanian law was extended by the court of appeals' opinion.

3. Petitioner's reference to an unrelated action, *Crescent Wharf & Warehouse Co., etc. v. The vessel C.C. SAN FRANCISCO*, District Court Case No. 84-6287 KN, is irrelevant. That case was not part of the record below. In all events, in reviewing Appendix G to the Petition, it is clear that the capacity issue was raised by plaintiffs in that case late into those proceedings. Further, it is unclear what evidence was or was not submitted to support the capacity argument. Respondent and the district court here could only deal with the facts, law, and evidence presented in this action. In this case, as detailed above, Petitioner failed to submit in a timely manner as ordered by the district court any evidence that the statutory three-year period was extended under Panamanian law, that "trustees" existed who were empowered to continue with litigation on behalf of Petitioner, or that Panamanian law authorized such a transfer of interest.

4. Petitioner's merger by judgment argument is a red-herring and is not part of the Question Presented by Petitioner. Respondent presented to the district court evidence conclusively establishing that there was a clear separation of actions, and that in all events the C.C. Line entities waived any such defense. At the time the Confession of Judgment originally was given, the damages for lost or unreturned equipment had not been incurred and could not form the basis for suit. It is disingenuous for Petitioner to argue that the limited Confession of Judgment somehow bars this action because the law does not

require a contracting party to treat each default as a material breach and to terminate the agreement. Proper set-offs were given in the default judgment for the prior Confession of Judgment, and the district court correctly determined there was no overlapping or duplicate recovery.

VI. CONCLUSION

There were no Fed. R. Civ. Pro. § 25(c) arguments raised in the entire eleven-year history of this case until Petitioner's motion for reconsideration was filed with the court of appeals. The court of appeals properly deemed the issue waived. The issue, therefore, was not "pressed or passed upon" by the Court below, and should not be recognized by this Court.

Substantively, there is no basis for mandamus or a writ of certiorari to issue in this case. The underlying record establishes that Petitioner's statutory grant of authority to prosecute and defend actions expired after three years, and that no provision was made for any substitute parties, including any non-disclosed and non-appearing "trustees," to appear and represent Petitioner's interests in this case. Putting the waiver issue aside, there simply is nothing in the record from which this Court could determine that Rule 25(c) has any application to this case.

The rulings of the district court and the court of appeals were consistent with the facts of record and established precedent. There are no conflicts of authority, and no important questions of federal law at issue. The

Petition for Writ of Mandamus or in the Alternative for Writ of Certiorari should be denied.

Dated: July 7, 1995

DAVID S. PORTER
FISHER & PORTER
A Law Corporation

DAVID S. PORTER
Attorneys for Respondent
Interpool Limited

APPENDIX 1

Fed. R. Civ. Pro. § 25(c):

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Fed. R. Civ. Pro. § 17(b):

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

Local Rules of the Central District of California, § 7.3.3:

> A party filing any document in support of, or in opposition to, any motion noticed for hearing as above provided after the time for filing the same

shall have expired, shall be subject to the sanction of Local Rule 27 and the F.R.Civ.P. Additionally, the Court may strike the filing of any such late document and disregard it for all purposes.

APPENDIX 2

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

INTERPOOL, LTD. PLAINTIFF, VS. CHAR CHING MARINE (H.K.) COMPANY, LTD., ET AL. DEFENDANTS.	)	CV 84-6333-IH CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

NOVEMBER 22, 1991

CANDEE MARSH
OFFICIAL COURT REPORTER
432 U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CA. 90012
(213) 625-2881

[p. 23] * * *

SOMETHING IN THE PAPERS LEADS ME TO BELIEVE THAT CHAR YIGH IS NOT EVEN AN EXISTING ENTITY AT THIS TIME. FOOTNOTE SIX IN THE NINTH CIRCUIT OPINION BACK IN 1989 ASSERTS

THAT CHAR YIGH AS OF THAT TIME WAS DISSOLVED. THE CIRCUIT SAYS THAT SINCE CHAR YIGH WAS A PANAMANIAN CORPORATION, UNDER PANAMANIAN LAW A DISSOLVED CORPORATION CAN CONTINUE TO DEFEND LITIGATION.

QUERY, IF A DISSOLVED PANAMANIAN CORPORATION CAN HAVE ANY STANDING OR STATUS NOT IN DEFENDING LITIGATION BUT IN ASSERTING THIRD PARY ATTACHMENT RIGHTS – BEFORE YOU REPOND, I WANT TO NOTE ON THE RECORD THAT IN 1986 IN FRONT OF JUDGE CURTIS, IN A PAPER CALLED "RESPONSE TO ORDER TO SHOW CAUSE," WHICH WAS FILED FEBRUARY 19, 1986, CHAR YIGH STATED FLATLY, THAT UNDER PANAMANIAN LAW ITS RIGHT TO DEFEND LITIGATION WOULD EXPIRE WITHIN THREE YEARS FROM THE DATE OF ITS DISSOLUTION. YOU WILL FIND THAT IN PLAINTIFF'S EXHIBIT C ON ITS POINTS AND AUTHORITIES IN THIS PROCEEDING.

THREE YEARS ARE GONE. SO WHERE ARE WE, SIR, UNDER THAT SITUATION?

[p. 24] MR. WOOLEY: I AM NOT PRECISELY CERTAIN. I BELIEVE, HOWEVER, THAT PANAMANIAN LAW ALLOWS THE TRUSTEES OF THE DISSOLVED CORPORATION TO CONTINUE TO PROSECUTE LITIGATION AFTER –

THE COURT: I DON'T HAVE THE TRUSTEES IN FRONT OF ME. I HAVE CHAR YIGH; CORRECT?

MR. WOOLLEY: CORRECT, YOUR HONOR.

THE COURT: OKAY. AND ON YOUR OWN STATEMENT, CHAR YIGH'S STATUS TO DEFEND AN ACTION ENDED IN '89; RIGHT?

MR. WOOLLEY: THAT WAS THE SITUATION WHEN I MADE THAT STATEMENT. I BELIEVE IT HAS BEEN REPLACED BY THE TRUSTEES FOR CHAR YIGH THAT THAT IS ONE OF THE POINTS –

THE COURT: WHAT HAS BEEN REPLACED?

MR. WOOLLEY: CHAR YIGH –

THE COURT: THE TRUSTEES ARE NOT A PARTY.

MR. WOOLLEY: THE TRUSTEES HAVE NOT BEEN SUED. THE TRUSTEES ARE ENTITLED.

THE COURT: OKAY. BUT THEY ARE CERTAINLY NOT A PARTY HERE.

MR. WOOLLEY: CORRECT.

THE COURT: SO YOU'RE TELLING ME THAT CERTAIN PEOPLE WHO ARE TRUSTEES MAY HAVE SOME RIGHT TO SOMETHING THAT IS IRRELEVANT TO ME. I DO NOT HAVE ANY SUCH TRUSTEES IN FRONT OF ME.

MR. WOOLLEY: CORRECT. THAT IS ONE OF THE REASONS [p. 25] THAT I ASKED FOR TWO WEEKS TO CONSIDER WHAT POSITION HAS TO BE MADE.

THE COURT: VERY WELL. GO AHEAD. HAVE A SEAT, I MEAN.

YOU KNOW THIS SITUATION ABOUT CHAR YIGH'S DISSOLUTION, NON-EXISTENCE AS AN

ENTITY AND THE EXPIRATION OF A SELF-ADMITTED THREE-YEAR PERIOD TO DEFEND LITIGATION, IN MY VIEW, BECOMES ANOTHER AND SEPARATE BASIS BEYOND THOSE I HAVE ALREADY DISCUSSED AND USED FOR GRANTING PLAINTIFF'S MOTION TO DISMISS CHAR YIGH AS A DEFENDANT.

AND UNDER THAT VIEW OF THE LAW, CHAR YIGH SIMPLY HAS NO RIGHT TO DEFEND ANY MORE. SO AS YOU CAN SEE THAT IS MY TENTATIVE VIEW WITH RESPECT TO MOTION NUMBER TWO, TO GRANT IT.

* * *

APPENDIX 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

INTERPOOL, LTD.	)	
PLAINTIFF,	)	CV 84-6333-IH
VS.	)	CERTIFIED
CHAR CHING MARINE (H.K.) COMPANY, LTD., ET AL.	)	COPY
DEFENDANTS.	)	

TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

JANUARY 13, 1992

CANDEE MARSH
OFFICIAL COURT REPORTER
432 U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CA. 90012
(213) 625-2881

* * *

[p. 9] I NOW WANT TO DISCUSS IN MORE DETAIL THE MATTER OF CHAR YIGH'S STATUS OR CAPACITY. I WISH TO INCORPORATE BY REFERENCE TODAY A TELEPHONE CONVERSATION ON THE RECORD AND REPORTED DEALING WITH THE SUBJECT OF CHAR YIGH'S STATUS TO CONTINUE TO PROSECUTE THIS ACTION OR TO DEFEND IT IN ANY CAPACITY.

AS YOU KNOW, AS YOU BOTH PARTICIPATED IN THAT TELEPHONE CONFERENCE THAT OCCURRED TUESDAY, THE 7TH OF JANUARY, A WEEK AGO TOMORROW. THERE IS A TRANSCRIPT ON FILE NOW OF THAT SESSION, SO I WILL NOT REPEAT THE STATEMENTS THE COURT MADE AT THAT TIME.

I WILL SUMMARIZE THEM ONLY TO THIS EXTENT. BASED ON OBJECTIONS OF THE PLAINTIFF TO MY CONSIDERING ANY OPPOSITION TO ITS SUMMARY JUDGMENT MOTION ON THE PART OF CHAR YIGH, AND BASED ON EARLIER DISCUSSIONS OF THE MATTER OF CHAR YIGH'S PRESENT STATUS, WHICH ARE ALSO PART OF THE FILE, I EXPRESSED GREAT RESERVATION ABOUT WHETHER CHAR YIGH CAN CONTINUE TO PARTICIPATE IN THIS CASE, EVEN AS A THIRD-PARTY CLAIMANT, OR TO ANY EXTENT IN ANY CAPACITY.

[p. 10] I CALLED TO THE ATTENTION OF COUNSEL CONCESSIONS ON THE PART OF CHAR YIGH'S COUNSEL SOME TIME AGO, BUT ON THE RECORD, PART OF THE FILE, THAT CHAR YIGH WAS DISSOLVED BACK IN '85, AND UNDER PANAMANIAN LAW ITS AUTHORITY TO CONTINUE PROSECUTING OR DEFENDING LITIGATION ENDED THREE YEARS LATER. THAT MATTER, FACTUALLY, WAS CONCEDED BY CHAR YIGH'S COUNSEL.

SO I TENTATIVELY PROPOSED, AS REQUESTED BY PLAINTIFF, TO STRIKE CHAR YIGH'S OPPOSITION BASED ON THOSE CONCESSIONS. AND I PROPOSED TENTATIVELY TO DECLARE THAT CHAR YIGH HAS

NO FURTHER STATUS, STANDING OR CAPACITY, TO CONTINUE IN THIS LITIGATION IN ANY WAY.

I THINK IN ORDER TO BE COMPLETE, I OUGHT TO STATE THAT THIS VERY MORNING, WITHOUT ANY LEAVE OF COURT, CHAR YIGH HAS FILED SOME PAPERS ON THE SUBJECT OF ITS CAPACITY, WHICH PAPERS I CANNOT SAY I HAVE READ BECAUSE THEY WERE JUST FILED TODAY AND I HAVE HAD AN EXTENSIVE MOTION CALENDAR TO ATTEND TO.

TO LIST THEM, WE HAVE CHAR YIGH'S INTERIM MEMORANDUM CONCERNING CAPACITY: OPINION OF MORGAN & MORGAN ON PANAMANIAN LAW. AND WE HAVE CHAR YIGH'S INTERIM MEMORANDUM CONCERNING CAPACITY – OH, THAT'S THE SAME DOCUMENT. I SEE. JUST AN ORIGINAL AND COPY.

IT APPEARS THAT THE OTHER PAPERS ALONG THIS LINE WERE FILED FRIDAY AFTERNOON, BUT I MUST TELL YOU THAT THAT WAS NOT KNOWN TO ME, AND ALTHOUGH I WAS HERE FOR QUITE A LONG TIME ON [p. 11] FRIDAY AFTERNOON, AT LEAST UNTIL 4:00, THESE PAPERS, AS FAR AS I KNOW, WERE NOT BROUGHT TO CHAMBERS OR BROUGHT TO MY ATTENTION.

THE PAPERS FILED FRIDAY AFTERNOON ARE ENTITLED "CHAR YIGH'S INTERIM MEMO RE CAPACITY." THAT'S ONE OF THEM. AND THE OTHER IS ENTITLED "INVOLUNTARY THIRD-PARTY CLAIM OF CHAR YIGH IN THE VESSEL SAN FRANCISCO OR

MORE PROPERLY A CLAIM OF INTERVENTION AS OF RIGHT."

MR. PORTER, WE'RE DEALING NOW THEN WITH, LET'S SEE, THREE DIFFERENT DOCUMENTS. COME TO THE PODIUM. YOU HAVE SEEN THEM ALL?

MR. PORTER: NO, I HAVEN'T, YOUR HONOR. THE ONLY ONE THAT –

THE COURT: HOW COME?

MR. PORTER: I DON'T KNOW.

THE COURT: WHICH ONES, IF ANY, HAVE YOU SEEN?

MR. PORTER: THIS MORNING BEFORE THE PROCEEDINGS, MR. WOOLLEY HANDED ME CHAR YIGH'S INTERIM MEMORANDUM CONCERNING CAPACITY OPINION OF MORGAN & MORGAN ON PANAMANIAN LAW.

THE COURT: THAT'S THE ONE THAT WAS FILED TODAY.

MR. PORTER: I DID NOT RECEIVE OR I HAVE NOT SEEN THE INVOLUNTARY THIRD-PARTY CLAIM DOCUMENT.

THE COURT: MR. WOOLLEY, CAN YOU EXPLAIN THAT?

MR. WOOLLEY: I DO NOT KNOW WHY MR. PORTER HAS NOT [p. 12] SEEN THE DOCUMENT FILED ON FRIDAY. I DO KNOW WHY I ALREADY FILED THE DOCUMENT AS TO MORGAN & MORGAN TODAY.

THE COURT: NO. I'M ASKING YOU TO EXPLAIN IF YOU CAN WHY A COPY OF THE FRIDAY-FILED DOCUMENT WAS NOT EARLIER MADE AVAILABLE TO HIM?

MR. WOOLLEY: IT WAS.

THE COURT: DID YOU SEND IT IN THE MAIL?

MR. WOOLLEY: PROBABLY, YOUR HONOR. I DO NOT KNOW.

THE COURT: WELL, THAT'S NOT A WAY YOU DEAL WITH OPPOSING COUNSEL ON DOCUMENTS YOU EXPECT OR HOPE WILL BE CONSIDERED FIRST THING MONDAY MORNING.

MR. WOOLLEY: THE FIRST –

THE COURT: HAVE YOU EVER HEARD OF FAXING OR MESSENGERS?

MR. WOOLLEY: YES, YOUR HONOR, I HAVE.

THE COURT: IS THAT NOR ELEMENTAL COURTESY, WHICH YOU WOULD EXPECT IF YOU WERE IN THE SHOES OF THE OTHER SIDE?

MR. WOOLLEY: STANDING HERE, YOUR HONOR, I ENTIRELY AGREE WITH YOU. I DO NOT KNOW WHY THAT WAS NOT DONE. I DO NOT KNOW THAT IT WAS NOT DONE.

THE COURT: WELL, IT'S OBVIOUS THAT IT WASN'T DONE BECAUSE MR. PORTER SAID HE HADN'T RECEIVED ANY SUCH AND YOU HAVE NO PROOF THAT IT WAS DONE; RIGHT?

MR. WOOLLEY: I DO NOT.

THE COURT: OKAY. WELL, HAVE A SEAT.

[p. 13] MR. PORTER, WHAT DO YOU WANT TO DO ABOUT THESE? IN MY VIEW, THEY ARE FILED MUCH TOO LATE WITHOUT ANY AUTHORITY FOR THEM TO BE FILED, AND I WOULD LIKE TO HEAR YOUR VIEW ABOUT IT AND WHAT YOU EXPECT THE COURT TO DO ABOUT THESE DOCUMENTS. I'LL GIVE YOU A FEW MINUTES TO LOOK AT THE ONES YOU HAVEN'T SEEN, IF YOU'D LIKE.

MR. PORTER: IT WOULD BE HELPFUL, YOUR HONOR.

THE COURT: ALL RIGHT. I'LL GIVE YOU NOW MY COPIES – PLEASE RETURN THEM TO THE CLERK – OF THE TWO JANUARY 10 FILINGS.

FIVE MINUTES OR AS SOON AS YOU CAN. LET THE CLERK KNOW YOU'RE READY.

THE BAILIFF: PLEASE RISE. COURT IS IN TEN MINUTE RECESS.

(RECESS TAKEN FROM 11:42 A.M. UNTIL 11:45 A.M.)

THE COURT: MR. PORTER.

MR. PORTER: THANK YOU, YOUR HONOR. AS TO THE INTERIM MEMORANDUM CONCERNING CAPACITY, WHICH APPARENTLY IS DUPLICATIVE OF THE DOCUMENT THAT WAS FILED THIS MORNING, WE WOULD SIMPLY NOTE –

THE COURT: WAIT JUST ONE SECOND. IT'S NOT THE SAME BECAUSE IT HAS NO PANAMANIAN LAWYER'S OPINION ATTACHED TO IT.

MR. PORTER: THAT'S CORRECT. BUT THE BRIEF ITSELF.

THE COURT: THE ARGUMENT IS WHAT YOU'RE SAYING?

MR. PORTER: THAT'S CORRECT. OUR OBJECTION TO THIS [p. 14] DOCUMENT, YOUR HONOR, IS THAT THERE HAS BEEN NO PROPER AUTHENTICATION OF THE MORGAN & MORGAN LETTER.

THE COURT: IT'S NOT UNDER OATH EITHER?

MR. PORTER: NO. THERE SIMPLY IS NO PROPER EVIDENCE OF PANAMANIAN LAW THAT HAS BEEN PRESENTED WITH RESPECT TO THIS DOCUMENT.

THE COURT: WHAT ELSE DO YOU HAVE TO SAY ABOUT ALL THREE DOCUMENTS?

MR. PORTER: WELL, WE WOULD ALSO NOTE WITH RESPECT TO THIS INTERIM MEMORANDUM, YOUR HONOR, THAT BECAUSE WE HAVE RECEIVED IT SO LATE, WE HAVE NOT HAD THE OPPORTUNITY TO REVIEW THE ALLEGATIONS OF PANAMANIAN LAW TO DETERMINE WHETHER THESE ARE TRUE AND CORRECT.

THE COURT: WHAT ARE YOU SAYING? THAT I SHOULD STRIKE THEM AS BEING WITHOUT AUTHORITY AND FILED TOO LATE?

MR. PORTER: YES, YOUR HONOR.

THE COURT: WHAT ABOUT THE OTHER DOCUMENT CALLED "INVOLUNTARY THIRD-PARTY CLAIM," ET CETERA?

MR. PORTER: YOUR HONOR, WE WOULD OBJECT TO THAT AS BEING WOEFULLY TOO LATE. THAT IS SIMPLY A REITERATION OF CHAR YIGH'S POINTS THAT THEY HAVE BEEN MAKING THROUGHOUT THIS LITIGATION – THAT THEY ARE THE OWNER OF THE VESSEL, THAT THEY ARE ENTITLED TO AN OWNERSHIP INTEREST, AND IN THE ALTERNATIVE, A THIRD-PARTY CLAIM INTEREST.

IT IS NOTHING NEW AS TO CHAR YIGH'S POSITION. IT'S [p. 15] SIMPLY THE FIRST TIME CHAR YIGH IN WRITING HAS ALLEGED TO BE MAKING A THIRD-PARTY CLAIM, THOUGH THROUGHOUT THESE PROCEEDINGS WE HAVE BEEN ALLEGING THAT THAT'S EXACTLY THE CAPACITY CHAR YIGH HAS BEEN STANDING IN.

SO WE WOULD MOVE TO STRIKE THAT DOCUMENT ON THE BASIS THAT IT DOESN'T ADD ANYTHING TO THE LITIGATION AND IS CERTAINLY SOMETHING THAT SHOULD HAVE BEEN FILED YEARS AGO.

THE COURT: ALL RIGHT, MR. WOOLLEY. DO YOU WANT TO BE HEARD ABOUT THESE PROPOSALS TO STRIKE ON OBJECTION THE THREE DOCUMENTS WE'RE TALKING ABOUT SO RECENTLY FILED?

MR. WOOLLEY: YES, PLEASE, YOUR HONOR.

TO ADDRESS THE INTERIM MEMORANDUM CONCERNING PANAMANIAN LAW. ON TUESDAY THE COURT SUGGESTED VERY STRONGLY THAT IT WAS GOING TO DISMISS MY CLIENT'S ABILITY TO DEFEND THIS CASE. I ADVISED THE COURT I WAS NOT AN EXPERT ON PANAMANIAN LAW. I HAD PREVIOUSLY REQUESTED INFORMATION AS TO PANAMANIAN LAW. I RECEIVED THE RESULTS OF THOSE INQUIRES ON SATURDAY BY FAX.

I CAME IN ON SUNDAY. I HAVE FILED THE PAPERS WITH YOU. THAT IS I'M AFRAID THE EARLIEST I COULD HAVE DONE IT. I WISH I COULD HAVE DONE IT EARLIER. THE INTERIM MEMORANDUM RE LAW COMES FROM THE PANAMANIAN LAW FIRM, MORGAN & MORGAN, AND IT STATES CATEGORICALLY THAT CHAR YIGH DOES CONTINUE TO HAVE THE STATUS OR THE CAPACITY TO APPEAR IN THIS CASE.

THE COURT: IT SEEMS COUNTER TO THE CONCESSIONS YOU [p. 16] CLEARLY MADE ON THE RECORD SOME TIME AGO.

MR. WOOLLEY: I DO NOT BELIEVE IT DOES, YOUR HONOR. AT FIRST I DID PREDICATE MY CONCESSIONS BY SAYING I WAS NOT A PANAMANIAN LAWYER.

THE COURT: BUT YOU MADE THE CONCESSIONS ANYWAY.

MR. WOOLLEY: I THINK WHAT I SAID, AND I BELIEVE THE RECORD WILL BEAR ME OUT, IS THAT CHAR YIGH ITSELF AS A CORPORATE ENTITY MAY

NO LONGER HAVE THE ABILITY TO APPEAR. BUT THE DIRECTORS –

THE COURT: WELL, WE'RE BACK WHERE WE WERE BEFORE. IF IT DOESN'T, THAT'S THE ONLY ENTITY WHICH HAS APPEARED AND HAS MADE THESE OBJECTIONS.

MR. WOOLLEY: YOUR HONOR, IF YOU WOULD PERMIT ME, THE DIRECTORS AS TRUSTEES IN THE NAME OF CHAR YIGH, WITHOUT HAVING TO APPEAR AS TRUSTEES THEMSELVES, ARE ABLE TO CONTINUE THE CASE IN THE NAME OF CHAR YIGH.

THE COURT: WE DON'T EVEN KNOW. THERE IS NO PROBATIVE EVIDENCE THAT THERE ARE ANY DIRECTORS LEFT. WE CERTAINLY DO NOT KNOW WHO THEY ARE OR THAT THEY HAVE DECIDED TO CONTINUE ON BEHALF OF YOUR CLIENT.

NO FURTHER DISCUSSION WILL BE NECESSARY. THE OBJECTION TO THE THREE DOCUMENTS FILED FRIDAY AFTERNOON AND THIS MORNING ARE SUSTAINED. THEY ARE STRICKEN. PLEASE LODGE ANY THAT HAVE BEEN FILED. ONE OF THEM IS MARKED "FILED," MR. CLERK, ALL THREE OF THEM ARE. WILL YOU STRIKE THE FILING. [p. 17] MARK THEM LODGED. THEY ARE FAR TOO LATE. THEIR RECEIPT AND CONSIDERATION AT THIS TIME IS NOT AUTHORIZED BY ANY COURT RULE OR PROCEDURE AND PREJUDICES THE OTHER SIDE.

* * *